Supreme Court, U.S.
FILED
APR 16 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

October Term, 1976.

No. 76-1438

CATAMORE ENTERPRISES, INC.,
PETITIONER,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
RESPONDENT.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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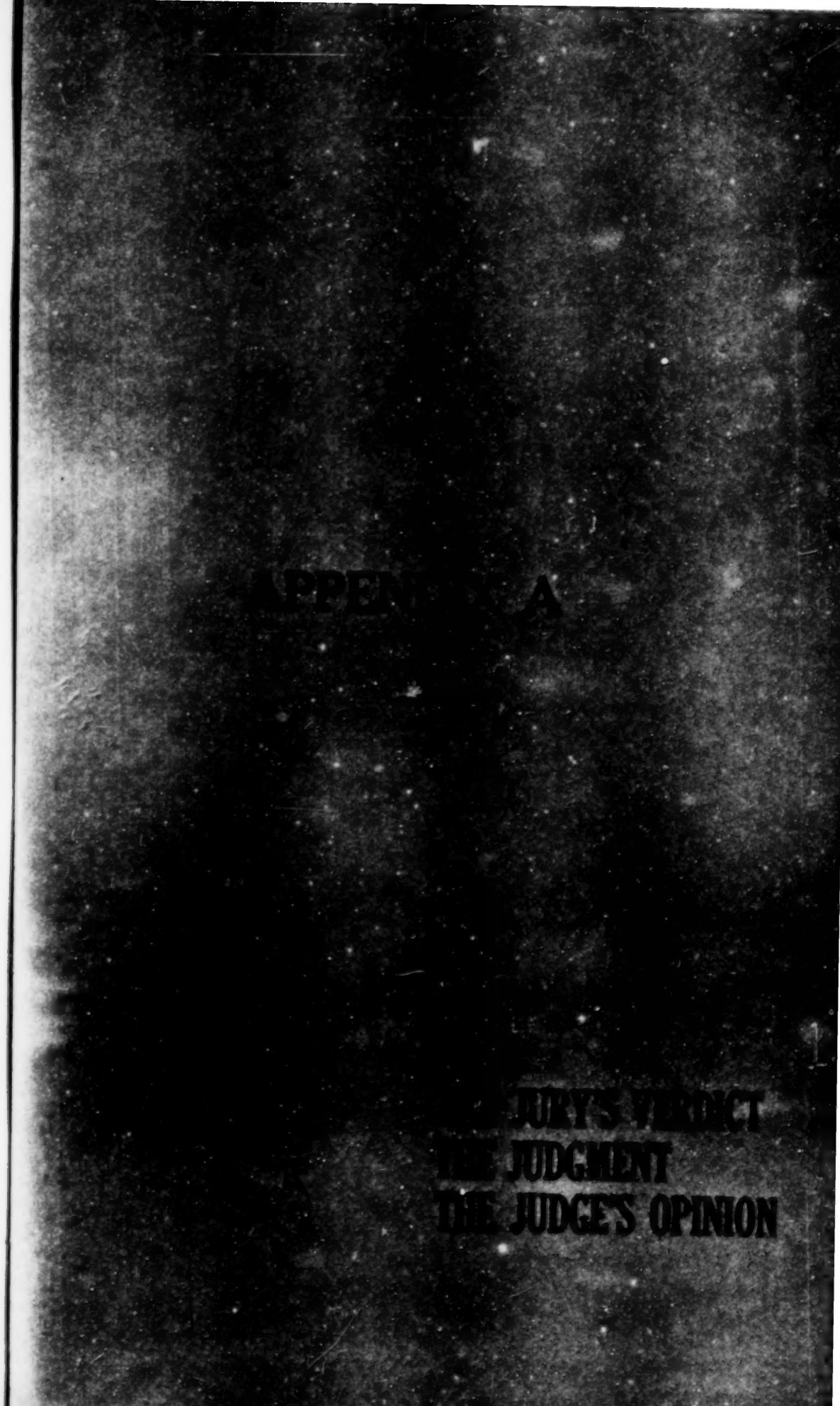

Appendix A.

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 5030

INTERNATIONAL BUSINESS MACHINES CORPORATION,

v.

CATAMORE ENTERPRISES, INC.

VERDICT SHEET

1. In the case of *IBM v. CATAMORE*:
   a. How do you find, for the plaintiff *IBM* or for the defendant *Catamore*?

      IBM

   b. If you find for plaintiff *IBM*, you are directed to award damages to *IBM* in the amount of $68,453.23.

      $68,453.23

2. In the counterclaims of *Catamore* v. *IBM*:
   a. How do you find, for the counterclaimant *Catamore* or for the counterclaim defendant *IBM*?

      CATAMORE

   b. If you find for the counterclaimant *Catamore*, in what amount do you award actual or compensatory damages?

      $11,400,000.00

   c. If you find for the counterclaimant *Catamore* under theory of fraud and/or gross negligence, you may, in accordance with my instructions, make a separate award of punitive damages to *Catamore*. If you award punitive damages, in what amount?

      $ None

/s/ DAVID S. MEDEIROS
Foreman of Jury

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF RHODE ISLAND

Civil Action File No. 5030

INTERNATIONAL BUSINESS MACHINES
CORPORATION
v.
CATAMORE ENTERPRISES, INC.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Raymond J. Pettine, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged in the case of International Business Machines Corporation vs. Catamore Enterprises, Inc., damages in the amount of Sixty-eight Thousand Four Hundred Fifty-three dollars and Twenty-three cents ($68,453.23) are awarded to International Business Machines Corporation;

In the counterclaims of Catamore Enterprises, Inc. vs. International Business Machines Corporation, compensatory damages in the amount of Eleven Million Four Hundred Thousand dollars ($11,400,000) are awarded to Catamore Enterprises, Inc. No punitive damages are awarded to Catamore Enterprises, Inc.

Dated at Providence, Rhode Island this 8th day of July, 1975.

[Signature]
Clerk of Court

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND
INTERNATIONAL BUSINESS MACHINES
CORPORATION
v.
CATAMORE ENTERPRISES, INC.,

Civil Action No. 5030

MEMORANDUM AND ORDER

The matter is before me on various motions filed by both parties at the close of a trial, resulting in a jury finding for the plaintiff on its claim and the defendant on its counterclaim.

• • •

Remaining is IBM's Motion for Judgment *n.o.v.* or alternatively, a new trial as to Catamore's counterclaim. This motion was presented by written briefs and oral argument at a hearing on October 28, 1975.

(P-432) IBM at pp. 1-2 of its memorandum in support enumerates three fundamental areas of error in the counterclaim verdict:

1. The damage aspect of the verdict is—
   a) grossly excessive and the product of an inflamed jury;
   b) based upon an asserted duplication of the amounts claimed.
2. The counterclaim verdict is inconsistent with the jury verdict for IBM on its claim.
3. Errors in rulings of law made by the Court during the course of the trial.

Logically, I should review these in reverse order and, therefore, I will start with point "3".

IBM's point III (pp. 34*ff*., IBM's Memorandum) addresses a number of rulings of law made by the Court during the trial, including: construction of written and oral agreements; the rulings on parole evidence and statute of frauds as they apply to the purported oral agreement of September 1968; limitation of liability and time to bring suit as provided in the written agreements; and the Court's grant to Catamore of leave to amend its counterclaim to add a count in negligence.

Not one of these arguments breaks new ground. Each point raised in point III was the subject of legal argument, both oral and written, during the course of the trial and of careful consideration by the Court when the evidence adduced at the trial was squarely and freshly before me; nothing in IBM's present contentions causes me to question the rulings I made at that time and I will not add further to this record by reviewing each issue point by point.

I now turn to the second issue raised. IBM asserts that the counterclaim verdict for Catamore is inconsistent with the verdict for IBM on its claim (pp. 31-33, IBM's Memorandum). IBM's attempt to support this point by removing from the context of an eighty-page charge the isolated phrase that the jury "could return a verdict for IBM only if it found that Catamore withheld payment 'without justification'" is unconvincing. The verdicts are consistent. As the Court clearly instructed, the jury could not base a verdict for Catamore on the counterclaim in *fraud* if it found for IBM on its claim. There is nothing to suggest that the jury did so. Indeed, the contrary is indicated by the jury's failure to award Catamore punitive damages.

(P-433) The verdict for IBM is entirely consistent with its finding for Catamore on the counterclaim as founded either in negligence and/or for breach of contract/contract

warranty, the latter of which is more likely in view of the amount of actual damages awarded and the absence of punitive damages.

IBM's argument at p. 48 of its memorandum, that Catamore's claim is based on both the avoidance of the limitations provisions of the SES agreement and affirmance of the rest of its terms, is without merit. *The jury's finding that there was no fraud in the execution of the 1968 Machine Services Agreement did not, as I charged, preclude the jury from finding that the SES agreement and its limitations were either voidable or not intended to supersede a 1968 oral agreement.* It was this 1968 oral agreement which furnished the basis for IBM's liability in contract and not the provisions of the SES agreement.

Finally, IBM attacks the jury's award of damages to Catamore as excessive, contending it was:

a) a product of passion and prejudice of the jury; and

b) without support in the record.

As to the first contention, this is refuted by the lengthy and orderly deliberations of the jury which proceeded in an entirely rational and balanced manner. One need only recall the sequence and choice of its request for evidence, which proceeded from the question of the existence of an oral agreement to the computation of damages. In each instance testimony in support of each side was requested. The sequestered jury deliberated in an orderly, almost clockwork manner for eight days.

In addition, I refer to p. 69 of Catamore's brief where Catamore reminds us that both prior to and during the trial it admitted the amount it owed to IBM in the absence of fraud or innocent misrepresentation in the execution of the Machine Services Agreement. I quote from its brief:

> "Additionally, the jury's award to plaintiff of the full amount of its claim would appear to refute the plaintiff's contention that the jury verdict is a result of 'passion and prejudice against a large corporation'."

I would add to that observation the fact that the jury also failed to award punitive damages against IBM, as it could have done under theory of gross negligence.

(P-434) I now turn to IBM's claim that the damage award is not supported by the evidence. This claim was most eloquently argued by Mr. Brown at oral argument, who focused on the admissibility of profit projections and the duplication of damages. To a large extent, IBM's attack on the admissibility of evidence of projections as to lost prospective profits, particularly contesting Mr. Catanzaro's ability to make the projections, is nothing more than a reiteration of arguments made at trial. Mr. Brown is correct in his statement at oral argument that the Court "agonized over several aspects of the matter," tr. at 8, before concluding that the evidence of projections was admissible. In support of his contention that the Court should reverse its earlier ruling, made when the evidence was fresh in its mind, Mr. Brown asserted that the absence of reliability and professional skill (tr. at 13) in the preparation of the projections was "fairly obvious to anyone who knows and deals with projections," tr. at 10. He contended:

> "If this is the projections [*sic*], it's shocking to find that it was seriously considered in a court of law and serving as a foundation for an 11.4-million-dollar verdict, some handwritten notes of the general sort. You can look at them yourself. Those are not projections like anybody makes in a business that I ever saw, and they bear none of the indicia of reliability by the business standard of which I am aware." Tr. at 13.

Thus counsel for IBM urges the Court to look beyond the record and overturn a jury verdict based upon the Court's understanding as to what meets the minimally acceptable standards of the general business community for profit projections. Such standards are not subject to judicial notice. Furthermore, I note that IBM had ample opportunity and resources to present these same arguments, with supporting testimony, to the Court and, subsequently, to the jury. I find nothing now properly before me for my consideration which would cause me to alter my earlier rulings on the admissibility of these projections and I reaffirm them.

This leaves the question of the asserted duplication of damages. As Mr. Christo states, Catamore freely acknowledged areas of duplicated damages throughout the course of the trial. I find this oral argument, which rested on specific references to testimony and documents in evidence, which I will not repeat, by far more persuasive than that of Mr. Brown, who sought to appeal to the Court's conscience on the ground that IBM cannot reasonably be believed to have agreed to expose itself to the prospect of multi-million dollar liability in order to secure Catamore's relatively modest account. That proposition is classically one for a jury to resolve. I must agree with Mr. Christo that Mr. Brown "presented an excellent argument to the jury," tr. at 56; but IBM has failed to raise concrete issues, not previously considered in depth by the Court in the course of trial, which would mandate a judgment *n.o.v.* or a new trial.

My instructions were quite explicit as to what elements of damages were recoverable under each theory of liability. As the judge who presided over this case for more than 56 days, I have no doubt the $11.4 million verdict is an amount entirely compatible with a finding of liability based upon breach of contract or contract warranty alone or in combination with a finding of liability in negligence as well. The

charge covered questions of duplication of damages; each theory of liability and damages recoverable thereunder were treated and set out separately, and each juror had a copy of the charge.

IBM's motion for judgment *n.o.v.* or in the alternative for a new trial on Catamore's counterclaim is hereby denied.

By Order,

[Signature]
Clerk

Enter:

Raymond J. Pettine
Chief Judge
December 15, 1975

United States Court of Appeals for the First Circuit

No. 76-1086

INTERNATIONAL BUSINESS MACHINES CORPORATION,

PLAINTIFF, APPELLANT,

v.

CATAMORE ENTERPRISES, INC.,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
MCENTEE, *Circuit Judge*, and FREEDMAN,* *District Judge*.

Jack E. Brown, with whom *George E. Hilty, Paul V. Bonn, Lois W. Abraham, Neil S. Cumsky, Philip E. Higdon, Michael J. Malley, Nicholas deB. Katzenbach, Palmer & Dodge, Edwards & Angell, Cravath, Swaine & Moore*, and *Brown & Bain, P.A.* were on brief, for appellant.

Thomas K. Christo and *Albert P. Zabin*, with whom *Rosann C. Madan* was on brief, for appellee.

September 30, 1976

COFFIN, *Chief Judge*. This case is a paradigm of complex litigation, rivalling the complexity of the cybernetics era from which it arises. It involves the unhappy relationships between a supplier of electronic data processing equipment and services, International Business Machines Corporation (IBM) and a customer, Catamore Enterprises, Inc. (Cata-

*Of the District of Massachusetts, sitting by designation.

more),[1] a manufacturer and distributor of jewelry. The events at issue here spanned the years between 1967 and 1971 and concern the efforts of Catamore to computerize, and thus expand, its operations with leased IBM equipment and the assistance of IBM services — the scope and quality of which are the heart of this suit.

Suit began in October, 1972, with the filing of a simple complaint by IBM in which it sought to collect $68,453.23 from Catamore for rental of equipment and payment for services. Catamore filed an answer containing a simple denial of the facts that would give rise to liability and a counterclaim asserting that IBM had breached numerous express and implied warranties of performance and claiming damages of $250,000. A year and a half later, Catamore filed eight additional counterclaims, principally identifying different elements of alleged damage but adding specific allegations of breach of contract and false representations, and claiming damages of $15,554,210. Trial began on March 10, 1975. On or about May 16, 1975 Catamore again amended its counterclaims in various particulars, adding a ninth counterclaim charging IBM with wanton, reckless, and negligent conduct and claiming $18,887,800 in actual damages and $7,293,234 in punitive damages. After 56 days of trial and 9 days of deliberation, the jury returned a verdict for IBM on its claim against Catamore in the amount of $68,453.23 and a verdict for Catamore on its counterclaims in the amount of $11,400,000.[2] IBM now appeals from the $11,400,000 judgment entered against it. Catamore has not appealed from the judgment against it.

IBM argues on appeal that, as a matter of law, there is no basis for liability for breach of contract or for negligence.

[1] Catamore, during the period giving rise to this litigation, was a group of closely related corporations organized by the Catanzaro family. The surviving corporate entity, after mergers, is the Phylcris Corporation.

[2] The court had earlier denied IBM's motion which sought a directed verdict as to all counterclaims except as to the ninth (charging negligence). Subsequently, after judgment, and after further hearing, the court denied IBM's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

In addition, it challenges the evidence and instructions as to damages and maintains that a number of rulings at trial and the allowance of excessive latitude to Catamore's counsel contributed to confusion and error.

In reviewing this case, we are not insensitive to the fact that we are dealing with a most arduously protracted trial, in which the district court took the utmost pains to avoid captious rulings, be fair to both parties, and to give both sides advance notice of its problems and proposed instructions. Equally weighty in our minds is the deference to be given the jury, which, faced with a host of complex issues on both liability and damages, spent nine days deliberating over the evidence of this 56 day trial. We are nevertheless compelled to vacate the judgment below and remand for a new trial. For reasons which are stated below, we deal only with the questions of contract liability.

What we might term the contract history of this case is the following. In the mid-1960's Catamore was a thirty-year old family company, which had specialized in selling religious jewelry to wholesalers and was in the process of expanding and diversifying its business. It was not only selling a general line of jewelry but, by 1965, was experimenting with a new sales method, "program selling", in which wholesalers were bypassed and, after market tests were run, prepackaged units of jewelry items were placed directly in retail stores of some of the large chains. Reordering would take place several times a year.

Catamore's tests led to increasing sales and expectations and the recognition that for it to develop capacity to process dramatically increased quantities of retail orders, and to coordinate production with demand, it would require a system of production control using electronic data processing equipment. Conversations between Catamore's President, Robert Catanzaro, and an IBM salesman, Davitt, led to a study of Catamore's needs by an IBM systems engineer.

Thereafter, IBM's representative staged a presentation for Catamore, in which he explained — through the use of schematic charts — the different steps necessary to computerize Catamore's production control system.[3] At this point, in September, 1968, Catamore decided to adopt such a system. It proceeded to sign a Machine Service Agreement, providing for the lease of a computer. Both parties understood that it was to be installed in December of 1969, after the necessary preparatory work had been done.

The core of this dispute is the opposite understandings of the parties as to who had the responsibility for doing this preparatory work, which consisted of general systems design (as to overall flow of the system), a more refined detail systems design,[4] and programming.[5]

It is Catamore's contention that IBM orally agreed to furnish, along with the computer, a completely computerized production control system on a "turnkey" basis, so that Catamore personnel (who would have had training in operating the system) could take over all operations. Even the ordinarily time-consuming task of programming was allegedly assumed by IBM since it would use and merely modify preexisting programs already in its library of programs. Catamore had only the obligations of hiring a programmer/

[3] This system included four functions of Catamore's operations: (1) an "order entry system" for the analysis of incoming orders from customers (i.e., showing what end product items were required); (2) invoicing (i.e., showing what end product items have been shipped); (3) inventory control (i.e., showing what items are on hand); and (4) a bill of materials system (i.e., showing what components are required to fill incoming orders).

[4] The second stage of systems design, analogized by a Catamore witness to the reduction of an architect's concept of a house to the specifications given a draftsman for the purpose of preparing blueprints. Its parameters, however, do not seem to be the subject of widespread agreement.

[5] Pursuing the architect analogy, the instructions to men and machines who build the house; there, the writing, in machine language, of a multitude of explicit instructions to a machine to enable it, for example, to produce, from appropriately organized data, a payroll. The process was described by Catamore's witness as starting with logical analysis, continuing with the writing of instructions, followed by a host of more explicit instructions ("coding"), and concluding with tests to identify and eliminate the inevitable human error encountered in writing instructions. The witness stated that a payroll program would probably require 20,000 explicit instructions, which might take a programmer a year, in the course of which he might initially write an erroneous instruction in every 200 or 250 instructions.

maintenance man to run and keep updated the system after installation and of converting basic data used in its manual system so that the data could be used by the computer.

It is IBM's view that, on ordering the computer equipment, Catamore would have available to it, at no extra cost, both the education of Catamore's employees in data processing and assistance in systems engineering design. The latter, according to one IBM witness, Davitt, meant that, to take one of the four operations of production control, the order entry system, IBM, working with Catamore, would develop a "systems design flow chart of order entry", i.e., more detailed design of this function, on the basis of which a programmer could begin to work.[6] The programmer then would write even more explicit instructions and then translate those into a coding language understood by the computer. Catamore would be allowed to use IBM facilities for testing. But all programming would be Catamore's responsibility, IBM not at that time performing this service for customers. IBM did, however, offer Catamore any of the package programs in its library which might be useful.

These contrasting views as to who was to do what were the seeds of what followed. While a chart of steps to be taken, and times within which they should be taken, to prepare for the December, 1969, installation of the computer and start-up of the new system had been a part of IBM's sales presentation, little seemed to be happening by way of joint consultation or implementation by either party during the next nine months. Some work on systems design was done by IBM; in April of 1969 Catamore had hired a controller, Correra, to supervise its data processing project; a start had been made on converting the items of Catamore's inventory to computer compatible numbers and a larger computer had

[6] Documents developed at this stage would include report layouts, showing both what reports produced by the computer would look like and the location of each piece of information on the report document; specifications of the reports expected from the computer and the information needed to produce the reports; and charts showing the flow of work.

been placed on order. But no Catamore employee had obtained any data processing education. In the meantime, Catamore had pushed ahead with its new sales approach, bringing back a significantly increased number of orders as the result of testing its product lines and packages in many retail outlets. It also prepared for expansion by making arrangements for additional facilities, financing, and new products.

In June, 1969, IBM announced a new policy to all its customers, stating that systems engineering services would be supplied on a charge basis, except that assistance which had earlier been mutually planned would be continued to be supplied without charge until January 1, 1970. In addition, rental charges would be reduced 3 per cent. This came to be called "unbundling". Catanzaro testified that he was assured by IBM's Davitt that unbundling would not affect Catamore since IBM's commitments would be fulfilled before January 1, 1970. When a new IBM marketing representative, O'Reilly, took over the Catamore account in September, 1969, from Davitt, he saw that the time remaining until December was inadequate to perform all the tasks necessary to launch the new system, and recommended to Catamore that delivery of the equipment be deferred to March or April of 1970. This was agreeable to Catamore, which was seeking a new building and which would not face another business season until the fall of 1970. It set an outside installation date of September, 1970.[7]

In November of 1969 IBM wrote Catamore, referring to the provision in the unbundling announcement that services earlier "mutually planned" would be continued without

[7] Catanzaro testified that "Software [i.e., the work on the production control system] was to be completed by January 1, 1970 and be delivered with the hardware." Apparently, in his view, the software was to be finished on the original schedule, but kept by IBM for a period up to eight months. Catanzaro explained this by saying that "the software had to be completed because after January 1st, 1970, IBM would be charging us for these services." As we have noted, it was O'Reilly's view that the programs would not be ready at this time.

charge until January 1, 1970. It listed the areas so agreed upon as: "Production Control, Inventory, Order Entry, Invoicing, Accounts Receivable, and Accounts Payable."[8] It then noted that "the system design for production control has been 90% completed with the remaining accounting application systems [presumably Accounts Receivable and Accounts Payable] to be designed." It concluded by stating that after January 1, 1970, services in the noted areas would be on a charge basis "as stated in our Agreement for IBM Systems Engineering Services." The parties disagree as to the message conveyed by this letter, Catanzaro testifying that he had been told by IBM personnel that the 90 per cent included programming, IBM witnesses insisting that this referred only to systems design.

Shortly thereafter, on December 9, 1969, Catamore signed IBM's form "Agreement for IBM Systems Engineering Services" (SES). This agreement stated that it was to govern all assistance in the installation and use of data processing products; that it was "the complete and exclusive statement of the agreement between the parties, which supersedes all proposals oral or written and all other communications between the parties"; that the customer's exclusive remedy should be limited in nature and amount to the amount paid for services under the applicable Service Estimate, that IBM would not be liable for lost profits or other claims, or for consequential damages; and that no action "arising out of the services under this Agreement may be brought by either party more than one year after the cause of action has accrued."[9]

[8] This listing does not conform to the parties' general treatment of "production control" as a system embracing the more particular elements of order entry, inventory, invoicing, and bills of material. The author of the letter later told Catanzaro that this listing was inaccurate in so listing "production control" and in omitting bills of materials.

[9] Because it is so critical to this case, we quote the SES agreement's limitation of liability clause in its entirety.

Limitation of Liability

The Customer agrees that IBM's liability hereunder for damages, regardless of the form of action, shall not exceed the total amount paid for

On the same date Catamore signed a Service Estimate, or authorization, in the amount of $4,884 for work to be done by October 31, 1970 — in contrast to the September, 1970, date which was orally agreed upon — on the production control system and other items. The forms stated that authorization was given "under the terms of the captioned Agreement for IBM Systems Engineering Services". Catanzaro testified that in authorizing his subordinate to sign this agreement, he did so because "we had committed our company to a course of action that was irrevocable" and, having been told that the remaining 10 per cent of work to be done would cost about $5,000, felt that all he would be giving up was the difference between this added obligation and the 3 per cent reduction in rental Catamore would receive.

On January 29, 1970, Catamore executed a second authorization in the amount of $2,508 for work to be done by March 30, 1970 in performing "the detail design and definition of the order entry/Inventory Control System previously developed . . . Included in this estimate are: 1. Program Descriptions. 2. Transaction Analysis. 3. Major Report Layouts. 4. Record and File Specifications [.] At the termination of this scope of effort, an estimate will be submitted covering programming implementation and documentation of the systems." This authorization contained the

services under the applicable Service Estimate or in the authorization for the particular service if no Service Estimate is made. This shall be the Customer's exclusive remedy.

The Customer further agrees that IBM will not be liable for any lost profits, nor for any claim or demand against the Customer by any other party.

No action, regardless of form, arising out of the services under this Agreement, may be brought by either party more than one year after the cause of action has accrued, except that an action for nonpayment may be brought within one year of the date of last payment.

IBM does not make any express or implied warranties, including, but not limited to, the implied warranties of merchantability and fitness for a particular purpose.

In no event will IBM be liable for consequential damages even if IBM has been advised of the possibility of such damages. [Emphases omitted.]

same explicit reference to the SES as did the previous authorization.[10]

At this point the focus shifts. In early 1970 Catamore not only had seen its program selling continue to expand but seized an opportunity to enter the costume jewelry field. When one of its customers (a costume jewelry firm which had bought fine jewelry from Catamore to supplement its line) ceased to do business with it, Catamore hired the customer's experienced sales force and Catanzaro brought about the creation of two new corporations, M. V. Creations, Inc., which was to purchase costume jewelry, and Vicario, Inc., which was to be a selling company (hereinafter referred to as MV/Vicario). A new and urgent need for a data processing merchandise control system arose. According to Catamore an oral agreement was reached in mid-March, 1970, for the creation of a merchandise control system to be completed in eight weeks. A larger computer was ordered and, beginning on March 30, 1970, a series of SES Estimates was entered into by MV/Vicario. All of these contained the above mentioned reference that "authorization for the above work is given under the terms of the captioned Agreement for IBM Systems Engineering Services".

The subsequent unfolding of events may be even more telescoped, since they are not germane to the issues we deem presently controlling. The system supplied to MV/Vicario, according to Catamore witnesses, failed to reflect inventory accurately, with the result that it ended 1970 in a badly over-

[10] Catanzaro testified that he understood this authorization to cover one half of the work previously authorized for $4,884, and that completion of this segment would see the job 95% finished. It seems unlikely that this additional authorization, which made no reference to a "parent" authorization, and which had a two-month period for completion — in contrast to the prior authorization's ten-month period — would reasonably be so construed. Moreover, the notation that an estimate covering "programming implementation" would be submitted when the work referred to was completed would, we think, have alerted Catamore that the work, as Catamore envisaged it, was far short of being 95% complete. A more likely explanation was given by two IBM witnesses, who testified that (according to Correra, who was not called to testify), this authorization was given by Catamore because it had not yet obtained a data processing manager who would have undertaken the more detailed work described. While Catamore asserts in its brief that this is not true, no effort to rebut this testimony was made.

inventoried position. When September, 1970, arrived, Catamore was still without a production control system and, faced with a deluge of orders, resorted to extreme efforts to cope with a crisis but was unable to process many orders. "Locked" into IBM equipment and system, Catamore, according to Catanzaro, was forced to await a 1971 delivery. The MV/Vicario salesmen, faced with reduced advance "draws" against commissions, left. Catamore again faced the busy fall season of 1971, unable to cope with orders and losing customers. An IBM study of Catamore's problem, presented in December, 1971, revealed, according to Catanzaro, only the problems he knew existed three years earlier. Various threats, cancellations, restrictions, promises, demands, and negotiations occupied the latter part of 1971 and much of 1972.[11]

While this narration is extensive, we have omitted reference to voluminous testimony bearing on acts IBM may or may not have done which would be relevant to Catamore's allegations of fraud, misrepresentation, or negligence. In so compressing our presentation of the facts, we have not captured the full flavor of Catamore's case, in its assertions and evidence as to negligence,[12] fraud and misrepresentation,[13] or damages.

[11] We omit from this narrative the events as seen by IBM — principally detailing the multifaceted business efforts of Catanzaro, it being part of IBM's theory that much of the cause of Catamore's difficulties arose from the key man, Catanzaro, overextending himself. We do not deem this subject matter relevant to our present discussion.

[12] Catamore relies on such items as the assignment by IBM of a mere trainee to design Catamore's system, the choice of a particular computer before the general design had been finished, the incompatibility of the computer with the type of disk storage drive chosen, the ordering of only two disk storage devices when three were called for by the flow charts prepared, the incompatibility of the computer with the particular "Bill of Material Application" package program planned to be used, IBM's advice that Catamore not have outside consultants, IBM's advice to convert to a new inventory numbering system without keeping a parallel system in reserve, a failure by IBM to warn adequately of the latent dangers of adopting a system based on electronic data processing.

[13] Catamore's catalogue of alleged frauds includes a "bait and switch" allegation (in that IBM, without Catamore's knowledge, cancelled the original computer order and substituted an order for a larger machine); IBM advice to change the inventory numbering system to an 8 digit system and thereby lock Catamore into computerization; the alleged representation in November, 1969, that IBM's work on the production control system was 90% completed; IBM's representation that the remaining 10% of the system would be completed for no more than $5,000; a misrepresentation as to an April, 1970, delivery date when IBM knew the equipment was not to be shipped till August; a misrepresentation that unbundling would not effect a price increase.

At this point we summarize in more detail both the theories of liability which were submitted to the jury and the parties' present positions with respect to them. Catamore's contract claims arise from its allegation that it and IBM entered into two separate oral contracts, each of which could be enforced consistent with the Statute of Frauds: the 1968 oral agreement for a production control system and the 1970 agreement for a data processing merchandise control system for MV/Vicario. A pivotal issue, of course, is the applicability of the SES agreement's limitations of liability clauses to these causes of action. The district court refused to rule that these contract claims were subject to the limitation of liability clauses in the SES agreement as a matter of law. It thought there was sufficient evidence of misrepresentation for a jury to find that Catamore had been induced to enter the SES agreement by fraud, rendering the agreement itself voidable, and that there were no other impediments to its rescission. *See* note 13, *supra*. Whether or not the SES agreement was valid, the district court also believed there were bases for regarding the two oral agreements as wholly independent of the SES agreement and not subject to its limitations. It therefore also permitted the jury to find both that the SES agreement was in effect and that both breaches of contract claims were meritorious. Catamore, in addition, now maintains that, whether or not the SES agreement is voidable, the limitations of liability clauses in it are themselves void and may not bar its contract claims.

IBM, not surprisingly, insists that the jury should not have been permitted to consider the contract theories of re-

covery. In its view, neither oral contract was enforceable: the 1968 agreement was within the Statute of Frauds and the 1970 agreement was not a contract since the parties intended that it would be reduced to writing before it would become binding. In any event, IBM insists that, as a matter of law, both contract claims were subject to the SES agreement — which it maintains was valid in all respects— and were barred by it.

Catamore's negligence claim is that IBM, in its dealings with Catamore, committed numerous unreasonable acts of misfeasance, all of which were independently actionable in negligence regardless of their relation to the contract claims. Even if the SES agreement barred the contract claims, Catamore maintains that the limitations of that written agreement should not be construed to apply to its negligence count. IBM, on the other hand, contends that the negligence claim should never have gone to the jury. Its view is (1) that the district court abused its discretion in permitting the addition of a negligence counterclaim on the twenty-ninth day of trial; (2) that, under the facts of this case, Catamore's sole remedy was in contract; and (3) that even if a negligence action was maintainable, this action too was subject to the limitation of liability clauses in the SES agreement.

Although the parties have briefed the whole range of issues referred to above, we will not, at this juncture, rule on the propriety of the trial court's having submitted each of these theories of liability to the jury. As to one issue, the objections IBM raises are not before this court.[14] Although we recognize that a decision by this court as to all the others

[14] IBM failed to take the steps required to preserve its substantive objections to Catamore's negligence claim. It neither moved for a directed verdict on the negligence counterclaim nor objected generally to the trial judge's instructions on this theory. However, it did belatedly raise its objections when it moved for a new trial following the jury verdict. Insofar as IBM's present objections amount to claims that the instructions to the jury were erroneous, it is precluded from obtaining appellate review because it did not present its objections to the trial court. The motion for a new trial alone is insufficient to place these issues before this court. *See Morris* v. *Travisano*, 528 F.2d 856, 859 (1st Cir. 1976); *Nimrod* v. *Sylvester*, 369 F.2d 870, 873

would simplify a second trial of this case, we do not undertake the task. Some of the issues are novel, and a few involve what appear to be close legal questions. We are reluctant to extend this opinion to include a number of complex legal determinations where it seems likely that some may ultimately not be necessary to the resolution of this dispute. Some of these questions will be determinative only if the jury makes factual assumptions which, while perhaps not improper, are unlikely. Because special verdicts were not returned in the first trial, *see* Fed. R. Civ. P. 49, we have no way of knowing either the factual assumptions the jury made or the theories of liability it found persuasive. While we would encourage at least the limited use of interrogatories in any retrial that occurs, *see* Fed. R. Civ. P. 49(b), we are confident that, whether or not they are used, the factual predicates of any jury verdict at a second trial will be clearer since the issues will have been narrowed as a result of our opinion today. In the appeal of that judgment, this court would be in a position to rule, on the basis of more focused briefs and factual presentations, on whatever legal issues appear to have in fact been determinative.

For the present, therefore, we focus in particular upon the issue whether, under New York law,[15] the SES agree-

(1st Cir. 1966), and cases cited. Insofar as IBM's claim may be characterized as an attack on the sufficiency of the evidence of negligence, its failure to move for a directed verdict bars it from obtaining normal appellate review. *See LaForest* v. *Autoridad De Las Fuentes Fluviales*, F.2d , (1st Cir. May 25, 1976) (slip op. at 2). Although there may be a limited exception to this rule in cases in which appellant moved for a new trial below on this ground and in which the jury verdict is totally without legal support, *see, e.g., Oliveras* v. *American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814, 817 (2d Cir. 1970), we do not consider its applicability here. It is doubtful that such a "plain error" has been committed, *compare Nimrod* v. *Sylvester*, *supra* at 873, and since a new trial will occur in any case and with further opportunity for IBM to present timely objections, there is no reason to depart from normal and well understood practice.

IBM's "procedural objection" to the negligence counterclaim is, of course, before this court. However, we are satisfied that the allowance of the amendment to the counterclaim was not an abuse of discretion by the trial court. The amendment simply brought the pleadings into conformity with the proof.

[15] The SES agreement specified that it was to be governed by the law of New York. Both parties appear to have assumed that any issues concerning the validity or application of this agreement are to be determined under New York law, and we do not make choice of law an issue on appeal.

ment, the voidable character of which we leave to the second trial,[16] barred the counterclaims for the breach of the two oral contracts. We do so because these contract issues predominated at the first trial and probably were conceived by the jury as central to the resolution of this dispute. Moreover, unlike many of the other claims where we cannot now say with any certainty that egregious errors were committed, we think that — notwithstanding the care taken at trial and indeed perhaps because of the spirited, relentless thrust and parry of this extended trial — the significance to be accorded facially comprehensive written agreements between sophisticated corporate entities was undervalued.

The morass of business dealings between two companies described on this record, their promises oral and written, the disparity of their understandings, the frustration of expectations, the inevitable recriminations and conflicting memories — all this is not unique, new, or infrequently encountered. The law in its effort to facilitate just resolutions of such controversies has, over the centuries, developed certain aids or guides to decision. Two of these are involved in the critical contracts questions at issue here. The first is the substantive principle that when, in the course of business transactions between people or corporations, free and uncoerced understandings purporting to be comprehensive are solemnized by documents which both parties sign and concede to be their agreement, such documents are not easily bypassed or given restrictive interpretations. The second is the functional principle that in our system of resolving disputes, the judge and the jury share in the decision process. In such a case as this the judge must first assess the evidence in order to decide

[16] At any second trial that occurs, we specifically encourage the trial court to use Fed. R. Civ. P. 49(b)'s mechanism to determine whether the jury found the SES agreement voidable, either in whole or in part, by reason of fraud on the part of IBM.

whether, under the substantive principle as illuminated by precedents, the jury should do the weighing.

Here, we think the judge improperly permitted the jury to conclude that the SES agreement, if not voided by fraud, had no effect on Catamore's claims of breach of the 1968 and 1970 contracts. The SES agreement contained a clause providing that an action for breach of contract could not be brought more than one year after the cause of action arose. Neither of Catamore's breach of contract counterclaims were made within one year after the respective causes of action accrued.[17] These actions are therefore time barred if the SES agreement applies to actions brought under the two oral agreements and if the limitation clause is valid. We are persuaded that the clause applies and is valid.

As to the 1968 oral agreement, the jury found in September, 1968, that IBM did in fact orally undertake to deliver a completely designed and programmed, turnkey production control system.[18] Given this finding, this contract con-

[17] Catamore's cause of action for IBM's failure to deliver a turnkey production control system accrued — if not by the deferred installation date in September, 1970 — at least, by June, 1971, when Catamore's staff was ordered to undertake the programming of the order entry and billing system. Catamore's counterclaim was filed on January 8, 1973, which, of course, was more than a year after the cause of action arose.

MV/Vicario's cause of action for breach of the 1970 oral agreement for a merchandise control system arose on one of the following dates: December, 1970, when it first discovered that programming deficiencies were allegedly resulting in excessive inventories; June, 1971, when MV/Vicario began going out of business; or December, 1971, when Catanzaro had demanded a rebate of $25,000 because of the alleged aforementioned programming defects. We need not decide the date on which the cause of action arose since in any case it was more than a year before the filing of Catamore's first counterclaim.

[18] Although IBM does not appear to be now challenging the sufficiency of the evidence of the oral 1968 agreement, we note both that the Machine Services Agreement's terms were such that the evidence of the 1968 parol agreement was properly admitted and that there was sufficient evidence of the alleged agreement to submit the question of its existence to the jury. We also note that we do not believe that the enforcement of this agreement was precluded by the Statute of Frauds. Although the alleged September, 1968, agreement called for delivery of the production control system by December, 1969, it nonetheless was not a contract which "by its terms is not to be performed within one year" within the meaning of the Statute of Frauds. This provision of the statute is interpreted narrowly. *See* 2 Corbin

cededly had complete vitality until December 9, 1969, when the SES agreement was signed. If all that had occurred on December 9 was the execution of the SES agreement, it may well have been open to the jury to decide that it had no effect on the September, 1968, oral agreement. By its terms, SES purported to supersede "all proposals oral and written and all other communications between the parties relating to the subject matter of this Agreement." Since an executed contract, oral or written, is not a proposal, and of higher dignity than a "communication," SES would seem not necessarily to apply. At the very least there would seem to be enough facial ambiguity to justify accepting other evidence of the parties' intent.

But the execution of the SES was accompanied simultaneously by Catamore's execution of its first Service Estimate. The Estimate was, according to Catamore, for the remaining 10 per cent of the work to be done. And, as we have noted, the Estimate form contained the statement, immediately above the space for a customer's signature, that "Authorization for the above work is given under the terms of the captioned agreement for IBM Systems Engineering Services." Catamore's president, as we have also noted, testified that what he thought to be the remaining 10 per cent of the work on the production control system was to be performed under the SES agreement. Because Catamore's claim for damages for breach of con-

on Contracts § 444; *Duncan* v. *Clarke*, 308 N.Y. 282, 125 N.E. 569 (1955). Although the parties to a contract may contemplate that it will not be fully performed within a year, such a contract will not be within the Statute unless performance within a year would itself be clearly contrary to the intentions of the parties. *Id; compare* Williston on Contracts. § 500 at 600. Here, the oral agreement could have been performed within a year consistent with the parties' intentions. Although there is testimony to the effect that the parties contemplated completion of the production control system by December, 1969, the testimony does not suggest that the parties actually intended that delivery should occur only on that date. Rather, it seems that December, 1969, was simply the time by which performance must occur and that performance prior to that time would not have been inconsistent with the parties' understanding.

tract arises from IBM's failure to *complete and deliver* the production control system and since Catamore appears clearly to have entered into an arrangement whereby the last 10 per cent of the work on this system was to be performed subject to the SES agreement, its claim for breach of this promise is necessarily governed by the one-year limitation period contained therein.

Because the parties have cast this issue in such different terms, we emphasize what we have not decided. We are not deciding that the SES agreement replaced or superceded the 1968 oral contract in its entirety. *See* 3 Corbin on Contracts § 578. Nor have we been required to determine which of two inconsistent provisions — one in the oral contract and one in the written contract — apply. *Compare Lasky* v. *Rabel Corp.*, 303 N.Y. 69 (1951). The SES provisions are new clauses, not inconsistent with any earlier ones. Catamore's argument that the SES agreement did not replace the *entire* earlier agreement misses the point. We accept the proposition that "parol evidence, which does not vary or contradict the writing, is admissible to complete the understanding of the parties." Here, however, we are concerned with the reverse situation: a writing which does not vary or contradict the evidence of the terms of the parol agreement.

Catamore objects to the application of the SES agreement to the 1968 contract on the grounds that when it entered the SES agreement it was ignorant of wrongs IBM had already committed in performing the 1968 contract. It insists that it cannot be held to have waived any rights under a contract when ignorant of wrongs already committed. This argument misses the mark. Although the evidence of wrongs IBM had already committed may well be relevant as to whether the SES agreement was fraudulently induced — at least insofar as it applied to causes of

action arising under the 1968 oral contract — and this evidence may also be supportive of other theories of recovery, it is irrelevant to the question of the effect of the SES agreement, if valid, on the contract action arising from IBM's failure to deliver the turnkey production control system by September, 1970. In December, 1969, Catamore agreed that any such action must be instituted within a year after its accrual. The present action not having been so instituted, it is barred by the SES agreement.

The applicability of the SES agreement to the performance of the 1970 oral agreement involving IBM and MV/Vicario is even more clear. Here again, the jury appears to have found that the discussions in the spring of 1970 culminated in a mid-March oral agreement providing that IBM would deliver a merchandise control system to MV/Vicario in eight weeks. Beginning on March 30, 1970 a series of Service Estimates were executed for work to be done for MV/Vicario.[19] Each such authorization contained the same notation that the authorization "is given under the terms of the .... [SES]." Catanzaro had testified that IBM's work for MV/Vicario was on the basis of the SES agreement.[20]

Catamore argues that MV/Vicario is a separate corporation and, since it was not a party to the SES agreement, the references to SES in the Service Estimates were not sufficient to require a conclusion that the SES limitation of liability clause applied to MV/Vicario. But the entire record in this case demonstrates the intimate relationship between Catamore and MV/Vicario as interrelated parts

[19] The first was signed by the customer, using the name "Catamore Jewelry Co. M V Creations Division"; subsequently only the name "M V Creations" appeared. At least one of these, dated May 28, 1970, was signed by Catanzaro for M V Creations.

[20] We express no opinion on IBM's contention that no parol contract could have been formed because the parties had contemplated committing their agreement to writing before it would become binding. This question will be relevant on remand only if the SES agreement is found voidable not only as it is applied to the 1968 oral agreement but also to this agreement.

of a common enterprise in which Catanzaro was the dominant leader. *See also* note 17, *supra*.[21] Catamore suggests that if the SES has any application to the MV/Vicario Estimates at all, it is limited to "the purpose of authorizing work to be performed". Catamore argues that this must be strictly construed against IBM and be read to refer only to a clause which states that estimates may be agreed to in writing, are not guaranteed and do not constitute a fixed price contract. But all of this information is set forth in the Service Estimate itself; absolutely no justification exists for construing this incorporation by reference so narrowly. The SES is a two-page document containing provisions under ten captions.[22] We see no such ambiguity in the words "Authorization for the above work is given under the terms of [SES]" as would justify any construction that would incorporate some terms and exclude others. 3 Corbin on Contracts § 559, p. 276. *See Level Export Corp.* v. *Wolz, Aiken & Co., supra.*

Since we find that the limitations in the SES agreement apply to both of Catamore's contract actions, we must now consider the validity of the provision limiting the period of IBM's liability to one year following the accrual of the cause of action. Catamore, not surprisingly, complains that it is unfair for IBM to attempt so to curtail its risks and liabilities. The short answer to their complaint is such clauses, providing the time limitation is reasonable, are valid under New York law. *Soviero Bros. Contr'g Corp.* v. *City of New York*, 286 App. Div. 935, 142 N.Y.S.2d 508

[21] Moreover, we see these facts as governed by *Level Export Corp.* v. *Wolz, Aiken & Co.*, 305 N.Y. 82 (1953), where a buyer was held bound, by a reference in its contract, to "Standard Cotton Textile Sales note", to the arbitration provisions therefor, despite its contention that it was not a party to such Sales note. The court held that one who signs such an agreement is, in the absence of fraud, conclusively presumed to know and assent to the terms so incorporated.

[22] The headings are: "Services, Term, Charges, Control and Supervision, Confidentiality, Rights in Data, Personnel, Service Estimates [referred to in text], Limitation of Liability and General."

(1st Dep't 1955), *aff'd*, 2 N.Y.2d 924, 141 N.E.2d 918, 161 N.Y.S.2d 888 (1957). We observe that a small consumer may often be required to deal with a large supplier on the latter's terms -- perhaps the forces of competition are the only check to one-sided dealings. In any case, it seems to us that when a supplier and its customer, neither of whom is helpless in the marketplace, agree on terms limiting the period of liability for future services to one year, those terms must be respected. We, therefore, hold that the district court erred in permitting the jury to find both that the SES agreement was valid and that IBM was liable to Catamore for having breached the two oral agreements.

At the second trial, Catamore may attempt to escape the limitations in the SES agreement by establishing that it was induced to enter into it by fraud. We do not rule out the possibility that the trial court might permit a jury to find fraud in the inducement only insofar as the SES agreement affects actions to recover under the 1968 oral agreement. Catamore may also attempt to recover on a negligence theory. We reemphasize that we are expressing no opinion on the merits of these alternative theories of recovery.

Finally, we realize that there are hotly contested issues concerning damages — such as the sufficiency of the basis for projecting lost profits, proximate cause, duplication and confusion, and adequacy of instructions. Without scrutinizing these in detail, we limit ourselves to suggesting that in any future retrial, exhibits such as charts be prepared so to minimize, if not avoid entirely, speculation that any elements of damages had been double counted. A jury is, in a case like this, given quite enough of a task without being unnecessarily confused.

The judgment is vacated and the cause remanded for a new trial.

Adm. Office, U.S. Courts — Addison C. Getchell, Inc. Legal Printers Boston

THE FIRST CIRCUIT FOUND

— the oral agreement was for a designed and programmed system —

. . . the jury found in September, 1968, that IBM did in fact orally undertake to deliver a completely designed and programmed, turnkey production control system. Given this finding. . . . (Opinion Page 15)

THE JURY, UNDER THE EVIDENCE, COULD FIND

— the oral agreement was only for system design —

The work that we mutually agreed upon doing was systems design, we didn't agree to do anything beyond the area of systems design. (T-3277)

— which is a lot less than the system —

Q. When you were referring to the systems design did you mean the term "systems design" to be exactly as the system itself? A. Oh, no, Mr. Edwards.

Q. Well, what would have been included in the system that was not included in the systems design?

A. Well, the system itself did consist of the programming, the documentation that allows for the correct operation of the [49 TR 8] system. Quite a bit more than just a system design, Mr. Edwards. (IBM Systems Engineer Racette, T-3277)

— and Catamore would have to do the programming —

A. Yes. In going through this chart, [referring to DX 10, E-314] as part of the presentation, I told Catamore . . . that the programming was very — was their responsibility, that they would have to provide people . . . (IBM Salesman, Davitt, T-2926)

— BUT —

Q. Well sir, the programs couldn't be written until the detailed design was done, is that correct?

A. That's true. (IBM Systems Engineer, Brassil, T-314) See also, infra

Appendix C.

IF THE JURY FOUND THE FACTS AS THE FIRST CIRCUIT ASSUMED, IT WAS CHARGED CORRECTLY (AND IDENTICALLY TO IBM REQUEST, C-28, C-206)

— TO CONSIDER THE SES AGREEMENT ONLY

Accordingly, if you find that *IBM*, at a time prior to the SES Agreement, became contractually obligated under an oral contract to provide all support services necessary to provide a totally integrated computerized system, including programs, *and* if you find further that, by their execution of the SES Agreement, the parties intended (to the extent that such services covered by such oral agreement were the same as or substantially similar to the services described in the SES Agreement) that the SES Agreement was to be substituted for such [57 TR 34] prior oral agreement, then the SES Agreement will be the only contract which you may consider in determining whether and to what extent *IBM* is liable to *Catamore* for breach of contract based on its alleged failure to furnish *Catamore* with a totally integrated production control system. (C-301-302)

— TO APPLY THE 1-YEAR LIMITATION CLAUSE

I must tell you that the SES Agreement limits the time period within which either *IBM* or *Catamore* could bring a legal action to recover for a breach of its terms. The SES Agreement provides that no action arising out of that agreement may be brought by either party more than one year after the cause of action has accrued, except that an action for nonpayment may be brought within one year of the date of last payment. *Catamore* commenced its countersuit against *IBM* on January 3, 1973). (C-308)

BUT

UNDER THE EVIDENCE, THE JURY DID NOT HAVE TO FIND THE FACTS AS THE FIRST CIRCUIT ASSUMED

THE FIRST CIRCUIT FOUND

— The Jury Could Decide what Effect the SES Agreement Had on the Oral Agreement —

> If all that had occurred . . . was the execution of the SES agreement, it may well have been open to the jury to decide that it had no effect on the September, 1968, oral agreement. . . . (Opinion, 16)

— except, the first Estimate was the last 10% —

> But the execution of the SES was accompanied simultaneously by Catamore's execution of its first Service Estimate. The Estimate was, according to Catamore, for the remaining 10 per cent of the work to be done. Opinion, 16)

THE JURY, UNDER THE EVIDENCE, COULD FIND

— the first Estimate was NOT for the last 10% —

> Now sir, doesn't that indicate, Plaintiff's Exhibit 3, [the "first Service Estimate"] that for $4,884, IBM had offered to complete the remaining 10% of the system?
>
> No sir, it does not.
> (IBM Salesman, O'Reilly, T-360)

— no work was ever done under it —

> Q. Now, what work, if any, was done pursuant to this estimate, which is, once again, Plaintiff's Exhibit 3?
>
> . . . we never did any work under this
> (IBM Systems Engineer Racette, T-3281)

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BUT

UNDER THE EVIDENCE, THE JURY DID NOT HAVE TO FIND THE FACTS AS THE FIRST CIRCUIT ASSUMED

THE FIRST CIRCUIT FOUND

— the oral agreement was for a designed and programmed system —

— the Jury could decide what effect the SES Agreement had on the oral agreement

— the first Estimate was for the last 10% (supra)

AND

— the SES 1-year limitation must therefore govern —

. . . since Catamore appears clearly to have entered into an arrangement whereby the last 10 per cent of the work on this system was to be performed subject to the SES agreement, its claim for breach of this promis necessarily governed by the one-year limitation period contained therein. (Opinion, 17).

THE JURY, UNDER THE EVIDENCE, COULD FIND

— the oral agreement was only for systems design

— which is a lot less than the system

— and Catamore would have to do the programming

— BUT could not before IBM did the systems design

— The first Estimate was NOT for the last 10%

— no work was ever done under it (supra)

— AND the work under the SES Agreement was TOTALLY unrelated to the oral agreement —

Q. Mr. Racette, were any of the items that were listed there referring to the first service estimate, PX-3, E-5] items which, to your understanding, IBM had previously agreed to furnish to Catamore?

A. No . . . this was new work, this was work that IBM never agreed to do . . .

(IBM Author of the first Service Estimate, T-3281)

. . . this document represents the same kind of support services you agreed to, doesn't it? [Referring to the first Service Estimate]

. . . that . . . is not anything that we had discussed in 1968 . . .

(IBM Salesman, Davitt, T-3052)

Q. Well, I'll show you Plaintiff's Exhibits 3 and 4, it says it's dated December 5, 1969 and January 29, 1970. (Handed to witness.) Don't they both refer to systems design for the very same system?

A. No, Mr. Christo, they don't refer to systems design, and I think I should explain — I need them to explain. (T-3371)

Q. Mr. Racette, on direct you testified that these systems engineering Estimates, Plaintiff's Exhibits 3 and 4, were in no way duplicative of the original work agreed to be done between IBM and Catamore; is that correct?

A. That's what I felt at the time, Mr. Christo, and I still feel that. (T-3380)

Appendix C.

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BUT

UNDER THE EVIDENCE, THE JURY DID NOT HAVE TO FIND THE FACTS AS THE FIRST CIRCUIT ASSUMED

THE FIRST CIRCUIT FOUND

— the oral agreement was for a designed and programmed system
— the Jury could decide what effect the SES Agreement had on the oral agreement
— Except, the first Service Estimate was for the last 10%
— AND the SES 1-year limitation must therefore govern (supra)
— **BECAUSE Catamore's claim for damages arises from IBM's failure to complete and deliver the system**

. . . [b]ecause Catamore's claim for damages for breach of contract arises from IBM's failure to *complete and deliver* the production control system . . . its claim for breach of this promise is necessarily governed by the one-year limitation period . . . (Opinion, 16, 17)

THE JURY, UNDER THE EVIDENCE, COULD FIND

— the oral agreement was only for system design
— which is a lot less than the system
— and Catamore would have to do the programming
— BUT could not before IBM did the system design
— the first Estimate was not for the last 10%
— no work was ever done under it
— AND the work under the SES Agreement was TOTALLY unrelated to the oral agreement (supra)

BECAUSE

Catamore had to have IBM's completed Systems Design before it could program its own production control system, Catamore's Damages, proven for not having a system, were caused by IBM's breach of a separate oral agreement by not providing either a complete or accurate systems design to Catamore — as the Evidence on the following pages shows

Appendix C.

IF THE JURY FOUND THE FACTS AS THE FIRST CIRCUIT ASSUMED, IT WAS CHARGED CORRECTLY (AND IDENTICALLY TO IBM REQUEST, C-28, C-206) — TO CONSIDER THE SES AGREEMENT ONLY

Accordingly, if you find that *IBM*, at a time prior to the SES Agreement, became contractually obligated under an oral contract to provide all support services necessary to provide a totally integrated computerized system, including programs, *and* if you find further that, by their execution of the SES Agreement, the parties intended (to the extent that such services covered by such oral agreement were the same as or substantially similar to the services described in the SES Agreement) that the SES Agreement was to be substituted for such [57 TR 34] prior oral agreement, then the SES Agreement will be the only contract which you may consider in determining whether and to what extent *IBM* is liable to *Catamore* for breach of contract based on its alleged failure to furnish *Catamore* with a totally integrated production control system. (C-301-302)

— TO APPLY THE 1-YEAR LIMITATION CLAUSE

I must tell you that the SES Agreement limits the time period within which either *IBM* or *Catamore* could bring a legal action to recover for a breach of its terms. The SES Agreement provides that no action arising out of that agreement may be brought by either party more than one year after the cause of action has accrued, except that an action for nonpayment may be brought within one year of the date of last payment. *Catamore* commenced its countersuit against *IBM* on January 3, 1973). (C-308)

BUT

UNDER THE EVIDENCE, THE JURY DID NOT HAVE TO FIND THE FACTS AS THE FIRST CIRCUIT ASSUMED

IF IBM'S AGREEMENT WAS ONLY FOR SYSTEMS DESIGN

A. The agreement for support in those areas was for systems engineering assistance in the development of the system design.

The Court: What does that mean?

The Witness: The systems engineer would assist in the developing of the systems design, the graphic flow charts . . . (T-153)

Q. Wasn't the agreement for work to be performed by IBM on a customized system for Catamore?

A. It was designed, it would be designed specifically for Catamore, if I understand your question. (T-152)

TO BE DONE BY IBM SYSTEMS ENGINEER BEFORE CATAMORE COULD PROGRAM

Q. And, the program was going to be written by whom?

A. The customer. [Catamore]

Q. And, he was going to write it from a flow chart prepared by somebody from IBM?

A. Jointly between IBM and the customer.

Q. Mr. Davitt, who would put the markings on the paper that was known as the flow chart?

A. Probably the IBM systems engineer . . . (T-141)

SYSTEM DESIGN FAULTY — Done by Trainee

Q. Now, Mr. Brassil, in September of 1968, when you were working on this study, designing the system, were you a trainee?

A. Yes, I was trainee for IBM . . . (T-256)

SYSTEMS DESIGN FAULTY — Only Xerox

Q. Are you telling me that in that particular system you designed that the computer was just acting like a Xerox machine copying the customer's order? [46 TR 128]

A. Essentially . (T-3130)

— Incomplete

Q. Defendant's Exhibits 106-A and 107-A. Would you identify them?

A. These documents were presented . . . in December of 1969, and they represented completed product of the mutually planned and mutually agreed — accomplished design. (T-3269)

Q. Now, is it your testimony this is the end product, right, just so we're clear?

A. No, the end product was in the book, . . . these are [50 TR 83] taken out of context. (T-3348)

Q. Where's the rest of it?

A. I think I have seen some of the pages in reviewing for this case, but the booklet as such I can't find in any of the pages, I can't, of any of the pages I can't find. (T-3349)

— Not Done By Expert

A. Mr. Christo, I would take all of these things into account if the people I was working with specified that the computer was to address that.

Q. Mr. Racette, weren't you the expert?

A. Mr. Christo, I never represented myself as an expert at anything. (T-3352)

SYSTEMS DESIGN FAULTY — No 'Check Digit Verification'

Q. Now, in designing the files for Catamore, . . . did you provide for a check digit?

A. For numbers?

Q. And would that prevent something that's been familiarly referred to as "garbage in" garbage out"?

A. There are others ways to do it but that would be one way to do it, yes.

Q. Well, did you provide anywhere in the systems design for check digit verification?

A. As I said, I don't remember if we discussed it. We might have. I just don't recall. (T-3217) (Brassil)

• • •

Q. And, you mentioned that the 106 and 107 took into account that problem; is that correct?

A. No, that's what — that's not what I testified to, Mr. Christo. [50 TR 94] What I have testified to is that this systems design allows for substitutions.

Q. Sir, don't you know anything about "Check digit verification"?

A. What is "check digit verification" got to do with incorrect substitutions?

Q. Sir, when products are entered in in order entry under the system you designed, which never was actually up and running, we understand, but under the design anyway, when an item is entered in, isn't it entered in by a number?

A. Could be.

Q. So, if a number is incorrect, that means there's a substitution, right?

A. Mr. Christo, I'm a little confused. (T-3354) (Racette)

SYSTEMS DESIGN FAULTY— Didn't Solve Any Problem

Q. Well, why don't we just forget about the substitution, since you're confused and talk about any problem. Could you tell me how these pieces of paper solved any problem? [50 TR 95]

A. These pieces of paper?

The Witness: Well, I've never represented that these pieces of paper could solve any problem. (T-3354-3355)

— Impossible

Q. Now, on the basis of that review and your professional opinion, was the system that Mr. Davitt originally proposed to Catamore possible?

• • •

A. No sir, it was not.

• • •

Q. And, why is that?

A. Two reasons, sir, that I could determine: One of them is the general design here certainly indicated the need for three disk drives. The BC-4 system that was proposed, the hardware itself, could only accept two.

• • •

. . . Secondly a BOMP system was called for as part of the system design. (T-1957)

ERRORS IN SYSTEMS DESIGN CAUSES ERRORS IN PROGRAMMING

Q. And sir, could the programmer make errors with respect to the programming if this system design he got from here [referring to DX 10, E-314] was wrong?

A. If it was wrong, or if it did not meet the requirements?

Q. If it was wrong in any way, if there was a mistake on it?

A. Yes, I would say possibly, yes. (IBM Salesman, Davitt, T-141)

IBM HAD TO COMPLETE SYSTEMS DESIGN BEFORE EVEN CATAMORE COULD DO THE PROGRAMMING

Q. Well sir, the programs couldn't be written until the detailed design was done, is that correct?

A. That's true. (IBM Systems Engineer, Brassil, T-314)

[7 TR 71] Q. Sir, isn't it correct that programming can't begin until the detailed systems design is done?

A. In the case of Catamore applications, yes, sir, that's correct.

Q. And, sir, didn't you just testify a little while ago that the detailed systems design was not done in the case of Catamore when you gave them that document?

A. Yes, sir, I did. (IBM Salesman, O'Reilly, T-363)

. . . the detailed specifications would have to be developed before it would be safe to do any significant amount of programming. . . .

This is a business that requires precedence; you can't test programs unless you have written them, and you really can't [3A TR 53] write them until you know what is the problem you are addressing. (Catamore Expert, Brandon, T-127)

Q. And, the program was going to be written by whom?

A. The customer. [Catamore] (IBM Salesman, Davitt, T-141-142)

Appendix D.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1086

INTERNATIONAL BUSINESS MACHINES CORPORATION,
PLAINTIFF, APPELLANT,
v.
CATAMORE ENTERPRISES, INC.,
DEFENDANT, APPELLEE.

ON PETITION FOR REHEARING

Before COFFIN, *Chief Judge*,
McENTEE, *Circuit Judge*, and FREEDMAN,* *District Judge*.

Jack E. Brown, with whom *George E. Hilty, Paul V. Bonn, Lois W. Abraham, Neil S. Cumsky, Philip R. Higdon, Michael J. Malley, Nicholas deB. Katzenbach, Palmer & Dodge, Edwards & Angell, Cravath, Swaine & Moore*, and *Brown & Bain, P.A.* were on brief, for appellant.

Thomas K. Christo and *Albert P. Zabin*, with whom *Rosann C. Madan* was on brief, for appellee.

January 17, 1977

PER CURIAM. The court has before it Catamore's petition for rehearing, IBM's memorandum in reply thereto, Catamore's motion to strike IBM's reply memorandum, and IBM's response to Catamore's motion to strike. We deny Catamore's motion to strike, and accordingly need not consider IBM's response thereto. As to the petition for rehearing itself, several of Catamore's arguments can be dealt with summarily. Points III (that the SES Agree-

* Of the District of Massachusetts, sitting by designation.

ment, not having been "accepted", was never effective), V (that the SES Agreement, based on differing assumptions of fact, was void), and VI (that the SES agreement is void, under Rhode Island law, for lack of consideration) were raised for the first time in the petition and will not be considered by this court. We also reject out of hand Catamore's repeated suggestions that the Seventh Amendment obliges this court to affirm judgments based upon jury verdicts which may have been predicated upon fundamental errors of law.

1. We conclude that IBM did raise the purely legal objection to Catamore's contract theories of recovery which was the basis for this court's decision. As to both oral contract claims, IBM moved for a directed verdict on the ground that the actions had not, as was required by the SES Agreement, been brought within one year of the accrual of the causes of action. Since this motion fully apprised the district court of the legal objection to Catamore's claims, we need not consider whether IBM properly objected to the jury instructions. *See Krock* v. *Electric Motor & Repair Co.*, 327 F. 2d 213 (1st Cir. 1964).*

II. Catamore cannot now attempt to sustain the jury verdict on the ground that the jury may have concluded that the alleged 1968 oral agreement was for "systems design" and not for a "turnkey production control system". Although the court's instruction suggested the possibility that the 1968 oral contract might have been found to be for something other than a turnkey production control system, the clear implication of the instructions —

* We would note that Catamore in its main brief on appeal seems to recognize this when it met IBM's argument that the judge had failed to decide the question of integration and/or supersession. Catamore, noting that the question was not when he should decide but whether he did so, stated "That he did decide the issue adversely to IBM's is evidenced by the admission into evidence of the oral agreements, the denial of IBM's motions for a directed verdict and judgment n.o.v., and the giving of instructions."

an implication which Catamore acquiesced in — was that Catamore's ability to recover on the alleged oral contract depended upon the jury's finding an oral agreement for an integrated production control system.

IV. We also reject Catamore's contention that the jury properly could have found the two causes of action to have "accrued" less than a year prior to January 3, 1973. The district court instructed the jury that the causes of action accrued when the breaches were or should have been discovered. Nothing Catamore refers us to calls into question our conclusions that, as a matter of law, the breaches of two alleged oral contracts should have been discovered prior to January, 1972. As to the 1968 oral contract, Catamore must have known of the breach by June, 1971. As to the 1970 oral agreement, Catanzaro must have discovered the breach by December, 1971, at the very latest. The court apologizes for the two typographical errors in footnote 17 of its opinion, and it will amend this footnote to read that M/V Vicaro began going out of business in June, 1971 and that Catanzaro demanded a rebate in December, 1971.

We observe that Catamore refers to contracts between the parties that occurred after January 3, 1972 and suggests that these somehow delayed the accrual of the causes of action. Under the district court's instruction, however, this plainly cannot be. Catamore could have plausibly argued that these contacts "tolled" the running of the SES Agreement's one year limitation period, but it requested no such instruction from the district court and may not attempt to uphold the jury verdict on a theory not presented to the jury.

The petition for rehearing is denied.

Appendix

SOME OF THE EVIDENCE IN SUPPORT OF THE

— what promises IBM

A. The words that we actually agreed upon during was systems design, we didn't agree to do anything beyond the area of systems design. (IBM Systems Engineer Rosette, T-3377)

— under the evidence

I told Catamore that [illegible] the programming was very — was their responsibility. . . . (IBM Salesman, Davitt, T-3069)

— what any oral contract's terms were

[47 TR 144A] Q. Did [illegible] you at any time that you were associated with the Catamore account ever promise to deliver ready to run programs for the Catamore Jewelry Company?

A. No sir, I did not. (IBM Systems Engineer Rosette T-3136)

— whether IBM breached any oral contract

The Witness: Well, I've never represented that these pieces of paper could solve any problem. (IBM Systems Engineer Rosette, T-3365)

Q. Oh, there's more?

A. Yes, sir, there is.

Q. Where's the rest of it?

A. I think I have seen some of the pages in reviewing for this case, but the booklet as such I can't find in any of the pages. I have all of the pages I can't find. (T-3349)

— damages caused by breach of any oral contract

. . . As the judge who presided over this case for more than 56 days, I have no doubt the $11.4 million verdict is an amount entirely compatible with a finding of liability based upon breach of contract or contract warranty alone . . . (P-426, supra, App. A)

THE FIRST CIRCUIT FOUND

— Even if the evidence permitted the verdict, the Instructions impliedly did not

Catamore cannot now attempt to sustain the jury verdict [because] . . .

. . . the clear implication of the instructions . . . was that Catamore's ability to recover on the alleged oral contract depended upon the jury's finding an oral agreement for an integrated production control system. (Opinion, Petition on Rehearing, 2-3)

THE TRIAL JUDGE EXPLICITLY PERMITTED THE JURY TO FIND

— what promises IBM made

Both parties have presented evidence, much of its conflicting evidence, as to the nature and scope of their relationship in September 1968. . . . what oral promises, if any, did either of them make to the other? . . . what exactly did IBM promise to do? (C-296)

— under the evidence

In determining whether or not any oral promises were made on behalf of IBM to Catamore, and what they were, you should consider from the evidence before you what was actually said and done by each of the parties in relation to the other. (C-296)

— what any oral contract's terms were

If, in accordance with my instructions on the law of contracts, you find that such an oral contract was made, you must determine what its terms were on the basis of the evidence presented. (C-295-296)

— whether IBM breached any oral contract

If you determine that in September 1968 a separate oral agreement was created in addition to the Machine Services Agreement, that there was consideration for the contract, and that the terms were clearly expressed and reasonably understandable, you must decide if, as *Catamore* claims, *IBM* breached any one or more of its terms. (C-298)

— damages caused by breach of any oral contract

If you find that *IBM* has breached any contract or [57 TR 52] contract warranty with *Catamore,* and if you find that *Catamore* has suffered actual damage as a direct result of the breach, then *Catamore* is entitled to damages for all harm naturally flowing from the breach and for such other items as were within the contemplation and understanding of the parties when they made the contract. (C-320)

E-1

Plaintiff's Exhibit No. 1—In Evidence

[redacted]

International Business Machines Corporation *Armonk, New York 10504*

Agreement for IBM Machine Service

27859

To: International Business Machines Corporation

Agreement No.: E 8677 U

Branch Office Address: 100 South Main Street, Providence, Rhode Island

Br. Off. No.: 348

Customer No.: 15113-00

Name and Address of Customer: Catamore Jewelry Company, 192 Georgia Avenue, Providence, Rhode Island

International Business Machines Corporation (IBM), by its acceptance hereof, agrees to furnish to the Customer, in accordance with this Agreement, its IBM machine service comprising the use of the below listed machines and features (called machine or machines) and machine maintenance service.

Type	Model	Description	Quantity	Monthly Availability Charge Each
2020	BC4	Central Processing Unit	1	$1,121.00
2560	A02	Multi-Function Card Machine	1	400.00
2203	A02	Printer	1	440.00
2311	001	Disk Storage Drive	2	720.00
2152	001	Printer Keyboard Console	1	135.00
029	C22	Keypunch (interpreting)	1	104.00
029	B22	Keypunch	1	81.00
059	002	Verifier	1	72.00
082	001	Sorter	1	55.00
1316	001	Disk Packs	8	120.00

OPH 15

Monthly availability charges invoiced will be as of the first of each month. Payment shall be made in full within thirty days after the date of invoice.

IBM V. Catamore
C. A. No. 5030
Pl. Exh. No. 1
For ~~Identification~~ Evidence
20 Feb 75

Term of Agreement

This Agreement is effective from the date it is accepted and shall remain in force, except as otherwise provided, for one year from the date the first machine is installed ready for use, and may be terminated by either party then, provided written notice is received three months prior, otherwise this Agreement shall remain in full force and effect. Thereafter it may be terminated or any of the machines may be discontinued by either party at the end of any calendar month provided three months' prior written notice is received.

Please send all communications to IBM at its branch office address listed above unless notified to the contrary.

Plaintiff's Exhibit No. 1—In Evidence

[illegible] monthly availability charge

The charges shown on the face hereof are those currently in effect. All charges are subject to change upon three months' notice. If the monthly availability charge is changed for any machine, the Customer may discontinue it or terminate this Agreement on the effective date of such change; otherwise, the new charge shall become effective.

The monthly availability charges include the use of machines by only one shift of machine operating personnel, and commence in each case the day following that on which each machine is installed ready for use. When a machine is used by more than one shift of machine operating personnel, an extra charge for each hour of use by such extra shifts shall be made at the rate of 1/176th of 50% of the monthly availability charges.

There shall be added to the above charges amounts equal to any taxes, however designated, levied or based on such charges or on this Agreement or the machines or their use, including state and local privilege or excise taxes based on gross revenue, and any taxes or amounts in lieu thereof paid or payable by IBM in respect of the foregoing, exclusive, however, of personal property taxes assessed on the machines and taxes based on net income.

Additional or Replacement Machines

Machines, in addition to the above or to replace any the Customer may have in use, will be furnished, if available, to the Customer under this Agreement, at the schedule of charges in effect on the date such machines are installed ready for use.

Cards and Tape

Cards, tape, other supplies, accessories and disk devices used to operate the machines are to meet the necessary IBM specifications.

Maintenance

IBM will keep the machines in good working order and will make all necessary adjustments and repairs. For this purpose IBM shall have full and free access to the machines. The required suitable electric current to operate the machines and a suitable place of installation with all facilities as specified in IBM's Installation Manual will be furnished by the Customer. IBM will not furnish maintenance service if the machines are located outside the United States, Puerto Rico or the Canal Zone.

Risk of Loss

During the period the machines are in transit or in the possession of the Customer, IBM and its insurers, if any, relieve the Customer of responsibility for all risks of loss or damage to the machines except for his responsibility for loss or damage caused by nuclear reaction, nuclear radiation or radioactive contamination.

Alterations and Attachments

Upon prior written notice to IBM, alterations in or attachments to the machines may be made. If the alteration or attachment interferes with the normal and satisfactory operation or maintenance of any of the machines in such manner as to increase substantially the cost of maintenance thereof, or create a safety hazard, the Customer will, upon notice from IBM to that effect, promptly remove the alteration or attachment and restore the machines to their normal condition.

Transportation and Traveling Expenses

All transportation, rigging and drayage charges upon the machines, both from and to the IBM plants, are to be paid by the Customer including those necessitated by capacity changes ordered by the Customer. Necessary packing cases for the return of the machines and a representative to supervise the packing will be furnished by IBM without charge. The cost of labor for erating and unerating machines is a Customer expense except when it is performed at either an IBM plant or reconditioning location.

When the distance from the point of installation of IBM's nearest branch office or resident location is greater than fifteen miles, travel expenses of IBM's Customer Engineers beyond fifteen miles for maintenance and repair of the machines are to be paid by the Customer.

Warranty

IBM warrants that the above machines when installed will be in good working order. IBM will make all necessary adjustments, repairs and replacements without additional charge to maintain the machines in this condition. All machines are supplied subject to these warranties, and IBM's obligation thereunder is limited to repair or replacement of any parts or machines when it determines that they do not conform to these warranties.

The foregoing warranties are in lieu of all other warranties expressed or implied, and of all obligations or liabilities on the part of IBM for damages, including but not limited to consequential damages, arising out of or in connection with the use or performance of the machines.

General

The terms and conditions of this Agreement supersede those of all previous agreements between the parties with respect to IBM machine service, and such service hereafter is subject to the terms and conditions of this Agreement.

This Agreement is not assignable; none of the machines may be sublet, assigned or transferred by the Customer without the prior written consent of IBM. Any attempt to sublet, assign or transfer any of the rights, duties or obligations of this Agreement is void.

Either party may terminate this Agreement for failure of the other to comply with any of its terms and conditions.

All machines remain IBM's property and may be removed by IBM at any time after termination of this Agreement.

This Agreement shall be governed by the laws of the State of New York and constitutes the entire agreement between the Customer and IBM with respect to the furnishing of IBM machine service. The foregoing terms and conditions shall prevail notwithstanding any variance with the terms and conditions of any order submitted by the Customer in respect of IBM machine service.

OPH 153

Received by IBM at Providence R.I.

Date Sept 25 1968

[signature]
IBM Branch Manager

This agreement is not effective until signed and accepted by IBM at its branch office.

Accepted by:

International Business Machines Corporation

By [signature]

Date

Catamore Jewelry Company
Customer

By [signature]

Partner
Officer's Title

Date 9-16-68

Please send all communications relating to IBM at its branch office address listed above unless notified to the contrary.

Plaintiff's Exhibit No. 2—In Evidence

International Business Machines Corporation — Armonk, New York 10504

Agreement for IBM Systems Engineering Services

To: International Business Machines Corporation

Agreement No.:

Branch Office Address:

180 South Main Street
Providence, Rhode Island

Br. Off. No.: 348

Customer No.: 15113-00

Name and Address of Customer:

Catamore Jewelry Company
192 Georgia Avenue
Providence, Rhode Island

The Customer and International Business Machines Corporation (IBM) agree that the following terms and conditions shall govern in all cases when IBM furnishes assistance to the Customer in the installation and use of data processing products.

Services

This Agreement shall cover all assistance in the installation and use of data processing products by IBM systems engineering personnel at the Customer's request, including, but not limited to, special studies, programming and application design and development, systems analysis and design, conversion and implementation planning, and installation evaluation. These services may be performed at either the Customer's or IBM's premises.

Term

This Agreement is effective from the date on which it is accepted by IBM and shall remain in force until terminated by the Customer upon one month's prior written notice or by IBM upon three months' prior written notice. Completion of any specific services or Customer's failure to order additional services hereunder shall not terminate this Agreement, it being the intent of the parties to leave this Agreement in effect in the event of future orders for services.

Charges

The Customer agrees to pay charges for these services, including billable travel time, in accordance with IBM's established rates and minimums in effect when the services are rendered.

All charges, rate classifications and minimum hours are subject to change by IBM upon three months' notice.

Charges will be invoiced monthly for services rendered and will be payable on receipt of invoice.

There shall be added to any charges under this Agreement amounts equal to any applicable taxes however designated, levied or based on such charges or on this Agreement or the services rendered hereunder, including state and local privilege or excise taxes based on gross revenue, and any taxes or amounts in lieu thereof paid or payable by IBM in respect of the foregoing, exclusive of taxes based on net income.

The Customer will reimburse IBM for special or unusual expenses incurred at the Customer's specific request.

Control and Supervision

Customer tasks on which IBM personnel assist shall remain under the supervision, management and control of the Customer.

Confidentiality

With respect to financial, statistical and personnel data relating to the Customer's business which is confidential, is clearly so designated, and which is submitted to IBM by the Customer in order to carry out this Agreement, IBM will instruct its personnel to keep such information confidential by using the same care and discretion that they use with similar data which IBM designates as confidential. With respect to technical data relating to the Customer's business which is confidential, and which must be submitted to IBM by the Customer in order for IBM to carry out its work under this Agreement, the Customer shall list such data on the Confidentiality Supplement to the applicable IBM Service Estimate in accordance with the provisions therein. IBM will instruct its personnel to keep such information confidential by using the same care and discretion with regard to the identified technical data as they use with similar data which IBM designates as confidential. However, IBM shall not be required to keep confidential any data which is or becomes publicly available, is already in IBM's possession, is independently developed by IBM outside the scope of this Agreement, or is rightfully obtained from third parties. In addition, IBM shall not be required to keep confidential any ideas, concepts, know-how, or techniques relating to data processing submitted to IBM or developed during the course of this Agreement by IBM personnel or jointly by IBM and Customer personnel.

Rights in Data

All original written material including programs, card decks, tapes, listings and other programming documentation originated and prepared for the Customer pursuant to this Agreement shall belong exclusively to the Customer.

The ideas, concepts, know-how, or techniques relating to data processing, developed during the course of this Agreement by IBM personnel or jointly by IBM and Customer personnel can be used by either party in any way it may deem appropriate. Each invention, discovery or improvement which includes ideas, concepts, know-how, or techniques relating to data processing developed pursuant to this Agreement shall be treated as follows: (a) if made by Customer personnel, it shall be the property of the Customer; (b) if made by IBM personnel, it shall be the property of IBM and IBM grants to the Customer a non-exclusive, irrevocable, and royalty-free license throughout the world; (c) if made jointly by personnel of IBM and the Customer, it shall be jointly owned without accounting.

This Agreement shall not preclude IBM from developing materials which are competitive, irrespective of their similarity, to materials which might be delivered to the Customer pursuant to this Agreement.

Please send all communications to IBM at its branch office address listed above unless notified to the contrary.

120-2000-2
(870-0393)

Plaintiff's Exhibit No. 2—In Evidence

P

Personnel

In recognition of the fact that IBM personnel provided to the Customer under this Agreement may perform similar services from time to time for others, this Agreement shall not prevent IBM from performing such similar services or restrict IBM from using the personnel provided to the Customer under this Agreement. IBM will make every effort consistent with sound business practices to honor the specific requests of the Customer with regard to the assignment of its employees; however, IBM reserves the sole right to determine the assignment of its employees.

Service Estimates

Estimates of services to be rendered under this Agreement may be agreed to in writing. No estimates are guaranteed in any way or to any extent by IBM, and do not change this Agreement to a fixed price contract. IBM will, however, notify the Customer as soon as practicable if the estimate will be exceeded, and the Customer may then terminate the services, paying only for effort expended to that time. Charges will be paid by the Customer at the established rates and minimums whether the charges are above or below the estimate.

Service Estimates may include agreed to work schedules of IBM personnel. IBM will attempt to provide personnel in accordance with such schedules subject to circumstances beyond IBM's control. Should an IBM employee be unable to perform scheduled services under this Agreement because of illness, resignation or other causes beyond IBM's reasonable control, IBM will attempt to replace such employee within a reasonable time, but IBM shall not be liable for failure to replace such employee within the schedule.

All schedules may be revised by mutual agreement.

Limitation of Liability

The Customer agrees that IBM's liability hereunder for damages, regardless of the form of action, shall not exceed the total amount paid for services under the applicable Service Estimate or in the authorization for the particular service if no Service Estimate is made. This shall be the Customer's exclusive remedy.

The Customer further agrees that IBM will not be liable for any lost profits, nor for any claim or demand against the Customer by any other party.

No action, regardless of form, arising out of the services under this Agreement, may be brought by either party more than one year after the cause of action has accrued, except that an action for nonpayment may be brought within one year of the date of last payment.

IBM does not make any express or implied warranties, including, but not limited to, the implied warranties of merchantability and fitness for a particular purpose.

In no event will IBM be liable for consequential damages even if IBM has been advised of the possibility of such damages.

General

The terms of this Agreement may be modified by IBM upon three months' written notice to the Customer. The Customer may exercise his right to terminate; otherwise, such modification shall become effective.

The term "this Agreement" as used herein includes any future written amendments, modifications or supplements made in accordance herewith.

The Customer acknowledges that he has read this Agreement, understands it and agrees to be bound by its terms and further agrees that it is the complete and exclusive statement of the agreement between the parties, which supersedes all proposals oral or written and all other communications between the parties relating to the subject matter of this Agreement.

This Agreement will be governed by the laws of the State of New York.

IBM V. Catamore
C. A. No. 5030
Pl. Exh. No. 2
For ~~Identification~~ Evidence
20 Feb 75

Received by IBM at Providence, R. I.

By _____
Branch Manager's Signature

T J. Sikorski
Branch Manager's Name

On 12/16/74
Date

Accepted by:

International Business Machines Corporation

By _____
Authorized Signature

_____
Date

_____
Title

On _____
Date

Catamore Jewelry Company
Customer

By _____
Authorized Signature

_____
Name

_____
Title

On 12/16/74
Date

APPENDIX G

RELEVANT IBM-REQUESTED INSTRUCTIONS

(4/28/75, C-16-C-68)

Appendix G.

[C-16] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 8*

With these general instructions in mind, I now direct your attention to this case which has been presented to you for the last weeks.

The legal questions raised have to do with claims made by IBM in its complaint and claims made by Catamore in its counterclaims. Neither IBM nor Catamore is restricted in seeking recovery of damages based on one theory of liability. Each has the right to make a number of claims or theories of recovery. Various claims and defenses have been advanced by both IBM and Catamore, and it is the duty of the Court and the jury to consider such theories as advanced. I now summarize for you the substance of each claim advanced by IBM and each claim advanced by Catamore.

The only claim advanced by IBM is that Catamore owes it money for goods and merchandise sold and delivered and for its services.

The counterclaims asserted by Catamore may be summarized very briefly as follows:

1. Catamore claims that IBM is liable to it for fraudulent misrepresentations which allegedly induced Catamore to enter into a contractual relationship with IBM involving the installation and use of certain computer equipment in connection with Catamore's business; and

[C-17] 2. Catamore also claims that IBM is liable to it for breach of contract, which includes among other matters an alleged breach by IBM of certain warranties with respect to the computer equipment.

Warranties may be express or implied. In this case, issues have arisen as to both express and implied warranties, about which I shall speak to you later.

As a result of the respective claims advanced by IBM and Catamore, each of such parties have alleged that they have suffered money damages. Before we get to the matter of damages, however, it is necessary to find that as a fact the parties have met their respective burdens of proof as to liability and I shall now instruct you as to the law which is applicable to the respective claims advanced by each of the parties in this case.

[C-18] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 9*

Creation of Contract — Applicable Principles

This is an action for breach of contract by IBM against Catamore based upon Catamore's failure, as alleged by IBM, to pay to IBM the sum of $68,453.23, as set forth in an account of Catamore's indebtedness to IBM, for goods and merchandise sold and delivered and for services rendered by IBM to Catamore.

This is also an action for breach of contract by Catamore against IBM, as set forth in the amended counterclaims filed by Catamore, in which Catamore claims substantial losses because of IBM's alleged failure to perform its contractual obligations to Catamore, including the fulfillment of certain alleged warranties, express and implied, about which I shall give you further instructions.

A breach of contract is a failure by a party to a contract to perform an obligation under the contract.

1 *Restatement of Contracts,* §312.

However, before I refer to the questions of fact relating to whether or not there has been a breach or breaches of contract in this case, it is necessary for me to instruct you concerning the contractual relationship between IBM and Catamore, so that you may exercise your responsibility to determine the facts relating to the nature and scope of that contractual relationship, which is a major factual issue in the case.

[C-19] Broadly speaking, a contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law recognizes as an obligation.

1 *Restatement of Contracts,* §1.

A contract between two parties, such as IBM and Catamore, may arise from an exchange of promises between them (as, for example, where one party agrees to furnish certain equipment to the other party and that other party agrees to pay rent for the equipment). Such a contract may of course contain various other terms and conditions, and the contract is not enforceable unless its terms and conditions are reasonably clear and definite and have been agreed to by both parties.

A promise under a contract, in order to be enforceable, must be supported by consideration. By the term "consideration," we mean that there must be some benefit to the party making the promise, which that party desired and which both parties bargained for and agreed to as part of the contract between them. Otherwise, the promise would be simply a gratuitous promise, without consideration, and the law will not compel the performance, or provide a remedy for the non-performance, of a promise for which there is no consideration.

1 *Restatement of Contracts,* §75;
Black's Law Dictionary (4th ed. 1951),
pp. 379, 830.

A contract may sometimes include warranties given by one or both of the parties in connection with their agreement. A [C-20] warranty is a promise, written or unwrit-

ten, that a fact or facts in relation to the subject matter of the contract (as, for example, machinery or equipment sold or rented under the contract) is now or will be in the future of a nature or quality as promised. A warranty may be an *express* warranty, that is, a warranty created by the explicit statements of the party to be bound, or an *implied* warranty, that is, by implication or inference, as a matter of law, from the nature of the transaction.

Black's Law Dictionary (4th ed. 1951),
pp. 1757-1759.

A contract may be in writing, or it may be, in whole or in part, an unwritten or oral contract. The law provides, however, that where the parties intended to express all of the terms and conditions of their contract in writing, and entered into a written contract, oral promises relating to the same subject matter, made before or at the same time as the written agreement, will not be allowed to add to or vary the written agreement.

1 *Restatement of Contracts*, §237.

This is a rule of law, applied by the Court. But, where (as in this case) there are written instruments setting forth certain agreements between the parties and also (as claimed by Catamore) oral agreements between these parties, it becomes your responsibility, as jurors, to determine a number of questions of fact, about which I shall give you further instructions.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 10

1968 Contractual Relationship

[C-21] In September 1968, IBM and Catamore executed a written instrument which is entitled "Agreement for IBM Machine Service" and which has been received as an exhibit in evidence in this case.

IBM takes the position that, when this written agreement was signed by the parties, it was not only a complete contract between the parties which contained all of the terms and conditions relating to the machines to be furnished by IBM to Catamore under the contract, but was also the only contract then in existence between them, whether written or unwritten.

Catamore, on the other hand, takes the position that the written agreement was not the only contract relating to the machines to be furnished and that there were other agreements, not in writing, between the parties at that time. Catamore claims that, at or about the time when the written agreement was signed, the parties entered into an oral or unwritten contract, whereby IBM promised to furnish Catamore with certain support services relating to the design, installation and performance of a totally integrated computerized system for Catamore's use in connection with the operation of its business.

Both parties have presented evidence, much of it conflicting evidence, as to the nature and scope of their relationship [C-22] in September 1968. It is undisputed that they executed the written Agreement for IBM Machine Service (which, for simplicity, I shall refer to as the "Machine Service Agreement."). But, in addition to the promises contained in the Machine Service Agreement, what oral promises, if any, did either of them make to the other?

Assuming that IBM made oral promises to provide support services to Catamore (which would have been in addition to the services described in the Machine Service Agreement), who made such oral promises in behalf of IBM? To whom, representing Catamore, were such promises made? When were they made? What exactly did IBM promise to do? Did IBM actually promise to provide Catamore with a totally integrated computerized system? Did IBM actually promise, in September 1968, that it would

prepare at some later date computer programs for Catamore? Or did it promise only to furnish some initial services such as systems design and training opportunities for Catamore's employees? What consideration or benefit to IBM, if any, was promised or provided by Catamore in exchange for any oral promises by IBM? Or were IBM's oral promises for additional services voluntary or gratuitous on IBM's part to provide assistance to Catamore, its customer, without charge?

In determining these and other related questions of fact, you should consider the respective positions of the parties and the surrounding circumstances as they existed at the time. In determining whether or not any oral promises were made in behalf of IBM to Catamore, as claimed by Catamore, you should consider [C-23] from the evidence before you what was actually said and done by each of the parties in relation to the other. If contractual obligations were created, it is necessary for you to find that they were created as the result of promises, which were clearly expressed and reasonably understandable, for which there was some benefit to the promisor. The law does not create a contract from the assumptions of one of the parties, uncommunicated to the other party from whom performance is expected, nor does liability for breach of contract arise from the disappointed expectations of that party where there was no mutual agreement in the first place.

[C-24] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 11*

Intent to Integrate Oral Agreement

If you find that, prior to or contemporaneously with the execution of the Machine Service Agreement, IBM and Catamore entered into an oral argeement with respect to support services, and if you find that the subject matter of that oral agreement was so closely related to the Machine Service Agreement that parties in the situation of IBM and Catamore would reasonably expect to include the terms of the oral agreement in their written agreement, then, as they did not do so, you must disregard the oral agreement, because under a rule of law, commonly referred to as the parol evidence rule, the agreements between the parties have been integrated in the written contract and the oral agreements have no legal effect.

See:

Mitchell v. *Lath*, 247 N.Y. 377, 160 N.E. 646 (1928);
Fogelson v. *Rackfay Const. Co., Inc.*, 300 N.Y. 334, 90 N.E. 2d 881 (1950).

[C-25] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 12*

Consideration — Alleged Oral Agreement

If you find that IBM made oral promises to Catamore to furnish certain support services and that such promises were not so closely related to the subject matter of the Machine Service Agreement as to create a reasonable inference on your part that parties in the situation of IBM and Catamore would have intended, and did intend, to include such oral promises in their written agreement (with the result that the promises amounted to a separate undertaking on the part of IBM), then you must determine what, if any, consideration was received by IBM when it made those oral promises to Catamore. If you find that IBM received no consideration for its separate oral promises, then you must find that such oral promises did not impose any contractual obligation upon IBM and that IBM is not liable to Catamore for any damages because of any failure

on its part to provide the support services as claimed by Catamore.

[C-26] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 13*

Absence of Separate Oral Agreement

If you find that IBM and Catamore did not mutually agree to enter into an oral contract containing the oral promises of IBM, as alleged by Catamore, whereby IBM was to provide support services to Catamore, or that such an agreement, if made, was not supported by consideration, then I instruct you to find that the written Machine Service Agreement was the only contract in existence between the parties in September 1968.

[C-27] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 14*

SES Agreement

It is undisputed that, on December 9, 1969, IBM and Catamore entered into a second written contract, which is entitled "Agreement for IBM Systems Engineering Services" and which has been received in evidence as an exhibit in this case. (For simplicity, I shall refer to this agreement as the "SES Agreement.")

The SES Agreement states that it shall cover all assistance in the installation and use of data processing products by IBM's systems engineering personnel at Catamore's request, including, but not limited to, special studies, programming and application design and development, systems analysis and design, conversion and implementation planning, and installation evaluation.

IBM takes the position that, if (prior to December 9, 1969) there existed an oral contract to provide the support services as claimed by Catamore (which IBM denies), then, to the extent that any such support services had not been provided by the time when the SES Agreement was made, those services are covered by the SES Agreement, which was substituted for and thereby superseded any such earlier agreement relating to services. It is also IBM's position that any undertakings on its part with respect to services, prior to the SES Agreement (which undertakings, IBM claims, did not amount to a contractual obligation) related only [C-28] to such initial services as systems design and educational opportunities made available, if requested, to Catamore's employees, and that any such undertakings on IBM's part did not include application design and development or programming.

This position taken by IBM is contrary to the position taken by Catamore, which claims, as I have noted, that at the outset of the contractual relationship between IBM and Catamore in September 1968, IBM became contractually obligated to Catamore to furnish Catamore with a totally integrated computerized system for use in the operation of Catamore's business.

Accordingly, if you find that IBM, at a time prior to the SES Agreement, became contractually obligated under an oral contract to provide all support services necessary to provide a totally integrated computerized system, including programs, *and* if you find further that, by their execution of the SES Agreement, the parties intended (to the extent that such services covered by such oral agreement were the same as or substantially similar to the services described in the SES Agreement) that the SES Agreement was to be substituted for such prior oral agreement, then the SES Agreement will be the only contract which you may consider in determining whether and to what extent IBM is liable to Catamore for breach of contract based

on its alleged failure to furnish Catamore with a totally integrated computerized system.

Conversely, if you find that the subject matter of the alleged oral contract was sufficiently differentiated from the subject matter of the SES Agreement, so that the latter was not [C-29] intended as a substitute for the former, then you may consider such oral agreement in determining whether and to what extent IBM is liable to Catamore for breach of contract based on its alleged failure to furnish Catamore with a totally integrated computerized system.

N. Y. General Obligations Law, (McKinney 1964), §5-1103, as amended;

1 *Restatement of Conflict of Laws,* Second §212(2);

58 *Am. Jur. 2d,* Novation §30;

15 *Williston on Contracts* (3rd ed. 1972) §§1865 ff.

Plaintiff's Requested Instructions to Jury

[C-34] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 19*

Disclaimer of Warranties

The law permits the parties to a contract to limit or exclude warranties, whether express or implied, from the contract which they have made.

IBM takes the position that only warranties relating to the computer hardware with respect to which IBM became contractually obligated are as specifically described in the Machine Service Agreement (relating to maintenance, repair and replacement) and that any warranties relating to systems engineering services are explicitly disclaimed and excluded by the SES Agreement. IBM maintains that there are no other warranties, whether express or implied, except as provided by the express terms of these written agreements.

I instruct you that the disclaimers in the written Machine Service and SES Agreements are valid and enforceable. I further instruct you that you must disregard any alleged warranties, whether express or implied, which might have arisen prior to or contemporaneously with the execution of each of these written contracts and which relate to the same subject matter covered by these contracts.

See:

Lumbrazo v. *Woodruff*, 256 N.Y. 92, 175 N.E. 525 (1931);
Railroad Waterproofing Corp. v. *Memphis Supply, Inc.*, 303 N.Y. 849, 104 N.E.2d 486 (1952).

[C-36] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 21*

Accrual of Cause of Action — Breach of Warranty

A cause of action for breach of warranty "accrues" when the party making the warranty breaches the warranty, not when damages are sustained as a result of the breach. A breach of warranty occurs when equipment is delivered or service is rendered which does not conform to the warranty, except that where a warranty relates to future performance and discovery of the breach is not possible until at a later date, the cause of action based on the breach does not accrue until the breach is or should have been discovered.

See:

67 *Am. Jur.* 2d, Sales §§ 425, 538.

[C-37] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 22*

SES Agreement — Limitation of Liability

The SES Agreement provides "that IBM's liability [under that contract] for damages, regardless of the form of action, shall not exceed the total amount paid for services under the applicable Service Estimate or in the authorization for the particular service if no Service Estimate is made. This shall be [Catamore's] exclusive remedy" [under that contract].

It is also stated in the SES Agreement that Catamore further agrees that IBM will not be liable for any lost profits nor for consequential damages. "Consequential damages" include such damage, loss, or injury as does not flow directly and immediately from the act or omission of a party but only from some of the consequences or results of such act or omission.

Black's Law Dictionary (4th Ed. 1951), p. 467.

If you find that IBM has in fact breached the SES Agreement or any warranties in connection therewith and that, as a direct and proximate result of such breach, Catamore has suffered damages, you are instructed that, as provided by the SES Agreement, Catamore shall not receive any award for loss of profits or for consequential damages and that the maximum amount of damages, if any, which may be awarded to Catamore is limited to the total amount which Catamore actually paid for services under the SES Agreement.

[C-38] *See:*

5 *Corbin on Contracts* (1964), § 1086, pp. 385-389.

[C-39] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 23*

SES Agreement — Limitation of Liability (continued)

The SES Agreement also provides that "[n]o action, regardless of form, arising out of the services [of that agreement], may be brought by either party more than one year after the cause of action has accrued, except that an action for nonpayment may be brought within one year of the date of last payment."

An action "accrues" when the wrong complained of in the action has become sufficiently complete that the complaining party is in a position to bring the action based on the wrong. An action for breach of contract accrues at the time of the breach, when the party has failed to perform what he agreed to do under the contract.

You are accordingly instructed that, with respect to support services covered by the SES Agreement (to which I have already referred), if you find that IBM failed to provide such services and that IBM's failure occurred prior to January 3, 1972, then you must find in favor of IBM with respect to any such claim on the part of Catamore.

See:

Soveiro Bros. Construction Corp. v. *City of New York*, 286 App. Div. 435, 142 N.Y.S. 2d 508 (1955), *aff'd* 161 N.Y.S. 2d 888, 141 N.E. 2d 918 (1957);

Donahue v. *Hartford Fire Ins. Co.*, 110 R.I. 603 (1972).

[C-40] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 24*

SES Agreement — Limitation of Liability (Continued)

The foregoing contractual limitation on the time in which Catamore must bring an action for breach of contract necessarily includes any claim for breach of warranty. If (consistent with any previous instructions on the subject of warranties), you find that IBM breached any warranty, whether express or implied, and that such warranty is related to the subject matter of the SES Agreement, *and* if you find that Catamore's cause of action for breach of such warranty or warranties accrued prior to January 3, 1972, then you must find in favor of IBM with respect to any claim on the part of Catamore based on the breach of any such warranty.

[C-41] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 25*

Breach of Contract — Time of Performance

One of Catamore's claims against IBM for breach of contract is based on IBM's alleged failure to deliver on time the computer equipment and accessories (the "hardware") ordered by Catamore and to furnish on time the support services, as alleged by Catamore (the "software"). However, it is IBM's position that the time for any such performance was postponed at Catamore's request and also as a result of additional requirements imposed upon IBM. If you find that such performance by IBM was postponed by agreement of the parties or because of additional requirements imposed by Catamore upon IBM, then you shall find that IBM did not breach its contract with Catamore with respect to the time of performance.

[C-42] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 26*

Entire Agreement

The Machine Service Agreement provides that the terms and conditions of that agreement supersede those of all previous agreements between the parties with respect to IBM machine service.

The SES Agreement states that Catamore, as the customer, "agrees that [the agreement] is the complete and exclusive statement of the agreement between the parties, which supersedes all proposals oral or written and all other communications between the parties relating to the subject matter of [the agreement]."

[C-43] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 27*

Presumption from Execution of Contract

As a general rule, a party, especially a party with experience in the business world, who accepts and executes a written contract is presumed to know its terms and conditions and to have assented to such terms and conditions, in the absence of fraud, which must be clearly proven by the party alleging the fraud. Furthermore, it is the duty of every contracting party to be aware of the terms and conditions of a written contract before he signs and delivers the contract. If the contract is clear and definite in its language, he will be bound by its terms and conditions.

> "To permit a party, when sued on a written contract, to admit that he signed but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts."
>
> 17 *Am. Jur. 2d*, Contracts §149 (at p. 498).

[C-55] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 38*

Contractual Limitations — Fraud

If you find that the parties executed the SES Agreement, and you find that the SES Agreement expresses the parties' contract as it relates to the providing of systems engineering services, and you find that IBM committed a fraud on Catamore in misrepresenting material facts relating to the subject matter of the SES Agreement, and you find that Catamore's cause of action for fraud accrued prior to January 3, 1972, then Catamore's cause of action for fraud is barred by the one-year contractual limitation stated in the SES Agreement; and you must find for IBM.

See:

Soveiro Bros. Constr. Corp. v. *City of New York*, 286 App. Div. 435, 142 N.Y.S. 2d 508 (1955), *aff'd* 161 N.Y.S. 2d 888, 141 N.E. 2d 918 (1957).

[C-62] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 45*

Measure of Damages for Breach of Contract

If you find that Catamore has breached its contract with IBM to pay the amount claimed by IBM for goods and merchandise, then you shall award to IBM as damages the sum of $68,453.23.

If you find that IBM has breached any contract with Catamore, and if you find that Catamore has suffered actual damage as a direct result of the breach, then you shall award Catamore as damages that sum of money as will compensate it fairly for the damage suffered as a direct result of the breach, provided all of such damage must have been reasonably foreseen by the parties at the time the contract was made.

See:

New York Water Service Corp. v. *City of New York*, 4 A.D. 2d 209, 163 N.Y.S. 2d 538, 542-543 (1957);

Spitz v. *Lesser*, 302 N.Y. 490, 99 N.E. 2d 540, 541 (1951);

Hughes Tool Co. v. *United Artists Corp.*, 279 App. Div. 417, 110 N.Y.S. 2d 383, 385, affd. 304 N.Y. 942, 110 N.E. 2d 884 (1952);

22 *Am. Jur.* 2d, Damages § 46, et seq.

[C-63] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 46*

Breach of Contract Damages — Proximate Cause

If you find IBM breached its contract with Catamore, you must find, in order to return a verdict for Catamore, that any damages suffered by Catamore flowed or resulted directly and not remotely from IBM's breach of contract.

There must have been no intervening occurrence over which IBM had no control between the breach and the damages, if any. Examples of intervening occurrences could be the lack of reasonable effort or carelessness displayed by Catamore's employees, the caliber of its competitors, the market for its type of products, its outlay for raw materials and other fluctuating costs, and charges and expenses.

For breach of contract to be the proximate cause of a loss the evidence must prove that Catamore foresaw or could have foreseen the damages alleged at the time the contract was made. In other words, in September, 1968,

Catamore should have foreseen or did foresee the losses it alleges to have been suffered as a result of IBM's alleged breach of the contract.

22 *Am. Jur. 2d*, Damages § 55.

[C-64] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 47*

Loss of profits if plaintiff is found to have breached its contract

If you find that IBM breached its contract with Catamore, and if you find that (1) Catamore lost profits as a direct result of that breach and (2) that Catamore proved both the fact that profits were lost and proved the amount of lost profits with reasonable certainty, (3) that Catamore was sufficiently experienced to assure profits, and (4) that the damages or lost profits could reasonably have been foreseen by both IBM and Catamore at the time the contract was made, then you shall award damages to Catamore for lost profits in such amount as is proved by the evidence for breach of contract.

This instruction with respect to loss of profits relates only to the award of damages, if any, for breach of contract. I shall give you other instructions as to the award of damages, if any, based upon fraudulent misrepresentations.

See:

Standard Machinery Co. v. *Duncan Shaw Corp.*, 208 F. 2d 61, 64-65 (1st Cir. 1953);

Flame Coal Company v. *United Mine Workers of America*, 303 F. 2d 39, 45-46 (6th Cir. 1962);

Harrison v. *Prather*, 435 F. 2d 1168, 1174-1175 (5th Cir. 1970);

[C-65] *Gurney Industries, Inc.* v. *St. Paul Fire and Marine Insurance Company*, 334 F. Supp. 845, 853 (D.C.N.C. 1971), *aff'd.* 467 F. 2d 588 (4th Cir. 1972);

Tnemec Company, Inc. v. *North Kansas City Development Company*, 290 S.W. 2d 1969, 1973-1974 (Mo. 1956);

Roadway Express, Inc. v. *Don Stohlman and Associates, Inc.*, 436 S.W. 2d 63, 65-66 (Ky. 1969);

22 *Am. Jur. 2d*, Damages §§ 171, 172, 358.

[C-66] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 48*

Profit Projections

If you find from the evidence that a projection or forecast of profits presented by Catamore or its witnesses is reasonably based in fact, then and only then may you consider the projection or forecast in determining with reasonable certainty the amount of lost profits, if any, as a direct result of IBM's breach of contract. In order to be reasonably based in fact, Catamore or its witnesses must have disclosed the factual data and underlying assumptions from which the projection or forecast was composed, so that the accuracy of the underlying figures and factual assumptions and the validity of the conclusions of the profit projection could be tested. Business records of Catamore, not opinions as to what profits could have been made, form the evidentiary basis of the profit projection. If you find there is no reasonable basis for a profit projection, you must not consider such profit projection in determining the amount of lost profits, if any.

See:

Harrison v. *Prather*, 435 F. 2d 1168, 1174-1175 (5th Cir. 1970);

Flame Coal Company v. *United Mine Workers of America*, 303 F. 2d 39 (6th Cir. 1962).

This instruction with respect to projection or forecast of profits relates only to the award of damages, if any, for [C-67] breach of contract. I shall give you other instructions as to the award of damages, if any, based upon fraudulent misrepresentations.

[C-68] *PLAINTIFF'S PROPOSED INSTRUCTION NO. 49*

Limitation of Damages for Breach of Contract

You are reminded that, with respect to any breach of contract under the Machine Service Agreement, that agreement provides for certain warranties, which are that the machines when installed will be in good working order and that IBM will make all necessary adjustments, repairs and replacements, without additional charge, to maintain the machines in this condition. The Machine Service Agreement provides that these warranties are in lieu of all other warranties, express or implied, and of all obligations or liabilities on the part of IBM for damages, including but not limited to consequential damages, arising out of or in connection with the use or performance of the machines.

You are further reminded that, with respect to the SES Agreement, that agreement provides that IBM's liability thereunder for any damages shall not exceed the total amount paid for services under the applicable Service Estimate or in the authorization for the particular service if no Service Estimate is made, that IBM will not be liable for any lost profits nor for any claim or demand against Catamore by any other party, and that in no event will IBM be liable for consequential damages even if IBM has been advised of the possibility of such damages.

APPENDIX H

RELEVANT IBM-REQUESTED INSTRUCTIONS THE 3 AGREEMENTS

(5/6/75, C-73-C-78)

Appendix H.

[C-73] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

INTERNATIONAL BUSINESS MACHINES CORPORATION,
PLAINTIFF
v.
CATAMORE ENTERPRISES, INC.,
DEFENDANT

Civil Action No. 5030

PLAINTIFF'S RESPONSE TO COURT'S REQUEST RE ADDITIONAL CHARGE

Plaintiff hereby submits to the Court a draft of an additional charge with respect to the relationship between the three alleged agreements in the case.

By its attorneys,
James K. Edwards
Edwards & Angell

May 6, 1975

[C-74] I think that at this point I should put all alleged agreements between the parties into focus: (1) There is an alleged oral agreement; (2) there is the September 1968 written "Agreement for IBM Machine Service"; and (3) there is the December 9, 1969 written "Agreement for IBM Systems Engineering Services".

The two written agreements have been received as exhibits in evidence in this case. For convenience, I shall refer to the "Agreement for IBM Machine Service" as the "Machine Service Agreement", and I shall refer to the

"Agreement for IBM Systems Engineering Services" as the "SES Agreement".

Let us answer the following questions as though you were asking them:

If you find there was an oral agreement in September 1968 whereby IBM promised to furnish Catamore with certain support services relating to the design, installation and performance of a totally integrated computerized system for Catamore's use in connection with the operation of its business, what was the relationship between such an agreement and the written Machine Service Agreement which the parties executed in September 1968? With respect to the subject matter of the written agreement I call your attention to the provisions of that agreement, which include the statement that the terms and conditions of that agreement supersede those of all previous agreements between the parties with respect to IBM machine service, and such service thereafter is subject to the terms and conditions of that agreement. If the parties made the oral agreement as alleged by Catamore, did they make the oral agreement before or at the time [C-75] when they made the written Machine Service Agreement? If you find that they made such an oral agreement before or at the time when they made the written agreement, did they intend the written agreement to cover all matters relating to the furnishing, installation and maintenance of IBM machines and equipment, or was the written agreement, as signed by the parties, intentionally incomplete so that other matters relating to the furnishing, installation and maintenance of IBM machines and equipment were not covered by the written agreement but were covered by an oral agreement, with the result that the written agreement and the oral agreement were both part of one agreement, which was partially written and partially oral? If you find that to be the fact in this case, then I instruct you that, to the extent there is any conflict between the terms of the written and oral parts of the agreement, the terms of the written part must prevail. In addition, any disclaimers in the written Machine Service Agreement, which relate to warranties and damages, are applicable to the entire subject matter of the complete agreement.

On the other hand, if you find that the written Machine Service Agreement was intended to be a complete agreement with respect to the furnishing, installation and maintenance of IBM machines and equipment and if you find that the parties made a separate oral agreement, as alleged by Catamore, prior to or at the same time, then there arises the question whether the subject matter of that oral agreement was so closely related to the subject matter of the written Machine Service Agreement that parties in the [C-76] situation of IBM and Catamore would reasonably expect and intend to include the terms of the oral agreement in their written agreement. If you find that to be the case, then, you must disregard the oral agreement entirely, because under a rule of law, commonly referred to as the parol evidence rule, the agreements between the parties have been integrated in the written contract and the oral agreement has no legal effect.

Thus, from what I have outlined to you, you should consider the nature and scope of the oral agreement as alleged by Catamore, when such an agreement was made, whether the parties intended the oral agreement to complete or supplement the written Machine Service Agreement so that the two agreements together were parts of one overall contract, partly written and partly oral (and hence subject to the written terms and conditions insofar as applicable), and whether instead the oral and written agreements were intended to be two separate agreements

and were not so closely related as to subject matter that the parties would have naturally expected to finalize their coverage of the subject matter in writing.

If the alleged oral agreement were made after the written Machine Service Agreement, or if the oral agreement were made prior to or at the same time as the written agreement but covered a subject matter sufficiently different from the written agreement that parties so situated would not have embraced it in the agreement they reduced to writing, then you may regard the alleged oral agreement as a separate agreement based upon its own terms and conditions, as agreed to by the parties, and you must then ask what, [C-77] if any, consideration was received by IBM when it made the oral promises to Catamore. If you find that IBM received no consideration for its separate oral promises, then you must find that such oral promises did not impose any contractual obligation upon IBM and that IBM is not liable to Catamore for any damages because of any failure on its part to provide the support services as claimed by Catamore. But if you find that IBM received consideration when it made such oral promises, then you may determine to what extent such promises imposed contractual obligations upon IBM, what those obligations were, whether IBM provided the support services as promised, and whether IBM is liable to Catamore for any damages because of any failure on its part to provide such services.

This brings me to the third of the three agreements which I have mentioned, namely, the SES Agreement, which was executed on December 9, 1969. If you decide that there were oral promises made by IBM in September 1968 to provide Catamore with support services relating to a totally integrated computerized system, that such promises are not to be disregarded because of their close relationship to the terms and conditions of the Machine Service Agreement (either because of integration under the parol evidence rule or because of the disclaimers in the written agreement), and that IBM received consideration when it made such promises, then there arises the question as to what effect, if any, the SES Agreement had with respect to the oral promises to provide Catamore with a totally integrated computerized system.

[C-78] I point out to you that the SES Agreement states that it shall cover all assistance in the installation and use of data processing products by IBM's systems engineering personnel at Catamore's request, including, but not limited to, special studies, programming and application design and development, systems analysis and design, conversion and implementation planning, and installation evaluation.

If you find that, by their execution of the SES Agreement, the parties intended that the SES Agreement was to be substituted for any prior oral promises to the extent that the services covered by such oral promises were the same as or substantially similar to the services described in the SES Agreement, which services had not yet been performed, then the SES Agreement will be the only contract between the parties which you may consider in determining whether and to what extent IBM is liable to Catamore for breach of contract based on its alleged failure to furnish Catamore with a totally integrated computerized system.

Conversely, if you find that the subject matter of the alleged oral promises was sufficiently different from the subject matter of the SES Agreement, so that the latter was not intended as a substitute for the former, then you may consider such oral promises in determining whether and to what extent IBM is liable to Catamore for breach of contract based on its alleged failure to furnish Catamore with a totally integrated computerized system.

APPENDIX I

RELEVANT IBM-REQUESTED INSTRUCTION CONTRACT DAMAGES

(5/16/75, C-79-C-81)

Appendix I.

C-79

Plaintiff's Amended Proposed Instruction No. 46 to Jury

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 5030

INTERNATIONAL BUSINESS MACHINES CORPORATION,
PLAINTIFF
v.
CATAMORE ENTERPRISES, INC.,
DEFENDANT

PLAINTIFF'S AMENDED PROPOSED INSTRUCTION NO. 46 TO JURY

Plaintiff, International Business Machines Corporation, hereby submits to the Court its amended proposed instruction No. 46 to the Jury in the form attached hereto.

By its attorneys,
JAMES K. EDWARDS
2700 Hospital Trust Tower
Providence, Rhode Island 02903
Attorneys for the Plaintiff

May 16, 1975

[C-80] PLAINTIFF'S PROPOSED INSTRUCTION NO. 46

Breach of Contract Damages — Proximate Cause

If you find IBM breached its contract with Catamore, you must find, in order to return a verdict for Catamore,

that any damages suffered by Catamore flowed or resulted directly, and not remotely, from IBM's breach of contract.

If you find that there was an occurrence or situation which intervened between the breach of contract and the damages claimed for such breach, which materially affected such damages and over which IBM had no control, then such damages were not the direct result of IBM's alleged breach of contract. Examples of an intervening occurrence or situation might be the failure of Catamore's employees to make reasonable efforts to avoid the loss or damage allegedly sustained, or the activities of Catamore's competitors and changing conditions in the market for Catamore's products, or the formation of a new business by Catamore, or substantial changes in the costs and expenses of Catamore's business.

For breach of contract to be the proximate cause of the damages as claimed, the evidence in this case must prove that Catamore and IBM foresaw or could have foreseen, at the time the contract was made, that a breach of contract would be likely to result in such damages. In other words, Catamore must prove that, in September 1968, Catamore and IBM should have foreseen, or did foresee, the losses which Catamore claims to have suffered as a [C-81] direct result of IBM's alleged breach of contract.

Hadley v. *Baxendale*, 9 Exch. 341 (1954);
Czarnikow-Rionda Co. v. *Federal Sugar Refining Company*, 255 N.Y. 33, 173 N.E. 913, 915-916 (1930);
George v. *George F. Berkander, Inc.*, 92 R.I. 426, 430-431 (1961);
22 *Am. Jur. 2d*, Damages §§55 ff.

APPENDIX J

RELEVANT IBM-SUBMITTED INSTRUCTIONS

(6/3/75, C-157-C-236)

Appendix J.

(C-157)

NOTE: Bracket [ ] indicates deletion and italics indicates (IBM) change from or addition to court's draft of jury charge

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

C. A. No. 5030

INTERNATIONAL BUSINESS MACHINES CORPORATION
v.
CATAMORE ENTERPRISES, INC.

Charge to Jury

Mr. Foreman, madam and gentlemen of the Jury, it is now the duty of the Court to instruct you in the law applicable to the cases which are about to be submitted to you. You will apply that law to the facts of the case as you, the jurors, determine those facts to be.

• • •

(C-159) What the evidence is and what inferences you will draw is for you and you alone to determine.

Though you are required to accept the law as I give it to you and apply that law to the facts, you alone decide those facts because you are the sole trier of the facts.

In the course of these instructions you must not draw any inferences that from what I am saying there is an expression of a point of view as favoring one side or the other. You must reject such an idea — that is not

my purpose. To convey any point of view would violate my solemn responsibility to always remain impartial and would invade the province of the jury. This is your verdict and your verdict alone based upon the law as the Court gives it to you and the evidence — as you find it to be.

It follows from what I have just told you that I must instruct you on the law as it pertains to contracts, warranties, express and implied, fraud, negligence, agency, damages and certain other law including the burden of proof which I need not list at this time.

Now, in order for you to reach a decision in this case, madam and gentlemen of the Jury, it is necessary for you first to determine what are the facts, to determine from all of the evidence put before you which of the contentions of the adversary parties is the true contention. It is the function of the jury (C-160) to consider the evidence introduced and to determine therefrom what are the facts. It is the duty of the Court to decide questions of law and to instruct you in the law applicable to the case, but it is for you to apply that law to the facts (C-161) of the case as you, the jurors, determine those facts to be. Therefore, the factual situation in this case, what actually happened, took place or transpired in respect to the occurrence or transaction under consideration, this is to be determined by you and by you alone.

• • •

(C-162) By the same token, from time to time the Court may have, for the purpose of ruling on evidence, said, "It is my recollection that the testimony was thus and so." This was necessary for the Court to do in order to make a ruling. However, if your recollection differs from that of the Court, again your recollection, not that of the Court, is controlling.

• • •

(C-164) Although the burden is on the party who asserts the affirmative of an issue to prove his claim by a fair preponderance of the credible evidence in the case, this rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

(C-165) It is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if, after consideration of all the evidence in the case, the jurors believe that what is sought to be proved on that issue is more likely to be true than not to be true.

In determining whether the proponent of a claim has sustained the burden of proof imposed upon it by law you should not limit yourselves to a consideration of only that evidence produced by the proponent, for the proponent may establish the burden of proving its claims by the greater weight of the evidence on the basis of all of the evidence properly before you without regard to whether at trial it was produced by *IBM* or by *Catamore*. In other words, when an item of evidence is in, it is in for all purposes regardless of whether it helps or hurts the party who produced it.

For the purpose of determination upon which side the greater weight of the evidence lies you may give consideration to the opportunity of the witnesses to have acquired knowledge of that to which they testified, to their conduct and demeanor while testifying, to their interest or lack of interest, if any, in the outcome of the case and to the probability of (sic) improbability of the truth of their testimony. From these circumstances proved at the trial, you may determine upon which side the greater weight of the evidence lies.

(C-166) You are the judges of the credibility of witnesses,

and the test for determination of credibility of witnesses is very similar to the test for determining where the greater weight of the evidence lies. You must determine the weight that you will give to the testimony of each witness. In considering the weight that you will give to the testimony of witnesses who appeared in Court, you may consider their demeanor in court as well as their actual testimony. "Demeanor" means the carriage, behavior, bearing and manner in which a witness testifies.

• • •

(C-185) Next let me take up contracts. This is an action for breach of contract by *IBM* against *Catamore* based upon *Catamore's* failure, as alleged by *IBM*, to pay to *IBM* the sum of $68,453.23, as set forth in an account of *Catamore's* indebtedness to *IBM*, for goods and merchandise sold and delivered and for services rendered by *IBM* to *Catamore*.

This is also an action for breach of contract by *Catamore* against *IBM*, as set forth in the amended counterclaims filed by *Catamore*, in which *Catamore* claims losses because of *IBM's* alleged failure to perform its contractual obligations to *Catamore*, including the fulfillment of certain alleged warranties, express and implied, about which I shall give you further instructions.

A breach of contract is a failure by a party to a contract to perform an obligation under the contract.

In September 1968, *IBM* and *Catamore* executed a written instrument which is entitled "Agreement for IBM Machine Service" and which has been received as an exhibit in evidence in this case and which has been referred to as the Machine Service Agreement.

IBM takes the position that, when this written agreement was signed by the parties, it was not only a complete contract between the parties which contained all of the (C-186) terms and conditions relating to the machines to be furnished by *IBM* to *Catamore* under the contract, but was also the only contract then in existence between them, whether written or unwritten.

[*Catamore*, on the other hand, takes the position that the written agreement was not the only contract made by the parties at the time and that there were other agreements, not in writing, made by the parties at that time.]

[Members of the jury, in the federal system a judge may comment on the evidence. However, I prefer not to do so excepting where I may feel obliged to make some general statements in order to explain a point of law. On pain of undue repetition I again point out that you alone decide the facts. With that in mind, let me point out you have heard such witnesses as Maury Davitt, Thomas Brassil, Christopher and Robert Catanzaro, [Dick Brandon], and so forth. In addition certain written documents were introduced to allegedly support the oral conversations and intent of the parties.]

[*Catamore* claims, that, at or about the time when the agreement was signed, the parties entered into an oral contract, whereby *IBM* promised to furnish *Catamore* with certain support services relating to the design, installation and performance of a totally integrated computerized system for *Catamore's* use in connection with the operation of the business.] *Catamore, on the other hand, takes a dual position. It contends alternatively (a) that the Machine Service Agreement was only a portion of the agreement made by the parties in September, 1968, and that another portion of such (C-187) agreement was oral *(sic) or (b) that at the same time that the Machine Service Agreement was entered into the parties also entered into a separate oral contract. According to Catamore, under the Machine Service Agreement* IBM *promised to furn-*

ish CATAMORE *and maintain for it a computer and certain other equipment ("hardware") and that by the oral portion of the September, 1968, agreement or by the separate oral agreement then entered into,* IBM *promised to furnish to* CATAMORE *certain support services, which, together with the hardware, would constitute what* CATAMORE *calls a "totally integrated computerized system," or "turnkey system," for its use in connection with the operation of its business and (c)* CATAMORE *particularly contends that included in the software which* IBM *promised in September, 1968, to furnish were the operating, or application, programs which were necessary to enable the hardware to produce the results which* CATAMORE *expected to receive from the "turnkey system."* IBM *denies that it promised to furnish such operating programs, which, it contends, were to be written, or coded, by* CATAMORE *itself. Thus, an extremely vital question for you to answer is, whose responsibility was it to write the operating programs? In accordance with my instructions on burden of proof, I now charge you that* CATAMORE *has the burden of proving by a fair preponderance of the evidence that* IBM *had promised to write those programs for* CATAMORE *and that, unless you find that* CATAMORE *has sustained that burden, you must find that* IBM *did not in fact promise to furnish to* CATAMORE *a totally integrated computerized, or turnkey, system and that, therefore,* IBM *cannot be held responsible for whatever damages* CATAMORE *may have suffered by reason of its not having such a system.*

(C-188) If, in accordance with my instructions on the law of contracts, you find that such [a] *an oral* contract was made, you must determine what its terms were on the basis of the evidence presented.

(C-189) As you know there were two written contracts executed by the parties. The first was in September, 1968, referred to as the "Machine Service Agreement." The second was on December 9, 1969 and entitled "Agreement for IBM Systems Engineering Services." I shall call this the "SES Agreement."

The SES Agreement states that it shall cover all assistance in the installation and use of data processing products by *IBM's* systems engineering personnel at *Catamore's* request, including, but not limited to, special studies, programming and application design and development, systems analysis and design, conversion and implementation planning, and installation evaluation.

[Now IBM takes a dual position. First it denies outright that there was any oral contract made with *Catamore*; but if you should find that there was such an agreement, then *IBM* argues those services which had not been provided by *IBM* up to the time of the SES Agreement are covered by the SES Agreement and that this SES Agreement was substituted for and thereby superseded any earlier agreement.]

IBM *takes the position that in September, 1968, it made to Catamore no binding promises other than those contained in the Machine Service Agreement; but if you should find that it did make binding oral promises to Catamore at that time, it will become necessary for you to find whether such oral promises were contained in the oral portion of a partly oral, partly written, contract entered into between the parties in September, 1968, or whether, on the other hand, such promises were contained in an oral contract separate from the Machine Service Agreement.*

(C-190) *If the former is true (i.e., there was one agreement, partly oral and partly written), then I charge you that the provisions of the Machine Service Agreement limiting warranties will apply to the promises contained in the*

oral portion of the September, 1968, agreement. If the latter is true (i.e., if there were two separate contracts entered into by the parties in September, 1968, one oral and one written), then you will have to determine whether there was consideration for whatever promises IBM *made in the oral contract and if so, whether such promises were subsequently superseded by the SES Agreement.*

Both parties have presented evidence, much of it conflicting evidence, as to the nature and scope of their relationship in September 1968. In determining whether or not any oral promises were made in behalf of *IBM* to *Catamore,* and what they were, you should consider from the evidence before you what was actually said and done by each of the parties in relation to the other. If contractual obligations were created, it is necessary for you to find that (C-191) they were created as the result of promises, which were clearly expressed and reasonably understandable. The law does not create a contract from the assumptions of one of the parties, uncommunicated to the other party from whom performance is expected, nor does liability for breach of contract arise from the disappointed expectations of that party where there was no mutual agreement in the first place.

Intention to contract is a factual issue the test for which is not the real intention of a party but rather whether his conduct would lead a reasonable man to believe that he intended to contract.

This now brings us to the question of consideration. I have told you that for the oral agreement to be binding there must be consideration. *A promise under a contract, in order to be enforceable, must be supported by consideration.* By the term "consideration" we mean that there must be some benefit to the party making the promise, which that party desired and which both parties bargained for and agreed to as part of the contract between them. Otherwise, the promise would be simply a gratuitous promise, without consideration, and the law will not compel the performance, or provide a remedy for the non-performance of a promise for which there is no consideration.

The law finds consideration for contracts in many things: it is not just money for services: consideration can be found in mutual promises where each party promises to do something as part of its bargain with the other. For example, you could find consideration in two parties' agreement to enter into one contract which is conditioned upon their (C-192) agreement to enter into another contract as well. Or you could find consideration in a buyer's forbearance from going to another seller to buy his version of a product included in the bargain with the seller. [or where a party, in reliance upon the promises of the other party, changed his position to his detriment in a way he normally would not have.]

Simply speaking, madam and gentlemen of the jury, if you find that *IBM* and *Catamore* did not [mutually agree to] enter into an oral contract whereby *IBM* was to provide support services to *Catamore,* or that such an agreement, if made, was not supported by consideration, then I instruct you to find that the written Machine Service Agreement was the only contract in existence between the parties in September 1968.

However, even if you find that, prior to or contemporaneously with the execution of the Machine Service Agreement, *IBM* and *Catamore* entered into an oral agreement with respect to support services, if you also find that the subject matter of that oral agreement was so closely related to the Machine Service Agreement that parties in the situation of *IBM* and *Catamore* would rea-

sonably expect to include the terms of the oral agreement in their written agreement, then, as they did not do so, you must disregard the oral agreement, because under a rule of law, the agreements between the parties have been integrated in the written contract and the oral agreements have no legal effect.

(C-193) If you determine that *in September 1968* a separate oral agreement was created *in addition to the Machine Service Agreement,* [in the September 1968 contract,] that there was consideration for the contract, and that the terms were clearly expressed and reasonably understandable, you must then decide if, as *Catamore* claims, *IBM* breached any one or more of its terms.

[Simply speaking, madam and gentlemen of the jury, if you find that in September 1968 and prior to December 9, 1969 there was indeed an oral contract whereby *IBM* was to provide all support services necessary to provide a totally integrated computerized system, including programs [which I have referred to as the September 1968 oral agreement,] and that it failed to do so as *Catamore* contends, then you must find *IBM* breached its contract and must respond in damages; and this breach exists regardless of the December 9, 1969 contract. Putting it in a different way, you look to the September 1968 oral agreement to decide whether or not there was a breach.]*

One of *Catamore's* claims against *IBM* for breach of contract is based on *IBM's* alleged failure to deliver on time the computer equipment and accessories ordered by *Catamore* and to furnish on time the support services, *as alleged* by Catamore. However, it *is IBM's* position that the time for any such performance was postponed at *Catamore's* request and also as a result of additional requirements imposed upon *IBM*. If you find (C-194) that such performance by *IBM* was postponed by agreement of the parties or because of additional requirements imposed by *Catamore* upon *IBM,* then you shall find that *IBM* did not breach its contract with *Catamore* with respect to the time of performance.

On the other hand, *Catamore* claims that it did not, by consenting to the postponement of arrival of the hardware at its plant, intend also to consent to delay the software beyond January 1, 1970, and that, at most, the postponement of hardware delivery was only until September 1, 1970. Again, you must consider from the evidence what the terms of this agreement *to delay* [of waiver] were, and what the intent of the parties was at that time. [Additionally, even if you find the parties intended that this postponement apply to delivery of software, in looking for a waiver, you must consider whether *Catamore's* assent to a postponement was induced by fraud, as I have defined it, on the part of *IBM*. One of the effects of fraud is to void any agreement induced by fraud. The law makes this rule because agreements must be based on a meeting of the minds of the parties to it, and where there is fraud, at least one party's mind is kept from meeting the true import of the agreement in question.]*

As I have already stated, *IBM* takes the position that, if you find that prior to December 9, 1969 there existed an oral contract to provide the support services as claimed by *Catamore,* then, to the extent that any such support services had not been provided by the time when the SES (C-195) Agreement was made, those services are covered by the SES Agreement, which was substituted for and thereby superseded any such earlier agreement relating to services.

* Preceding paragraph is sufficient. This paragraph, if used, should be modified, by adding conditions of consideration and no supersession.

* Fraud does *not* automatically void an agreement.

If you find that *IBM* and *Catamore* by executing the SES Agreement intended that the SES Agreement was to be substituted for the prior oral agreement, then you must disregard any claim that the earlier oral contract was breached and look only to the SES Agreement because in such event the SES Agreement will be the only contract which you may consider in determining whether and to what extent *IBM* is liable to *Catamore* for breach of contract based on its alleged failure to furnish *Catamore* with a totally integrated computerized system.

It is undisputed that, on December 9, 1969, *IBM* and *Catamore* entered into a second written contract, which has been received in evidence as an exhibit in this case and referred to as the SES Agreement.

The SES Agreement states that it shall cover all assistance in the installation and use of data processing products by *IBM's* systems engineering personnel at *Catamore's* request, including, but not limited to, special studies, programming and application design and development, systems analysis and design, conversion and implementation planning, and installation evaluation.

It is *IBM's* position that *if there was a September 1968 oral agreement, which IBM denies, then* by signing this document, a novation occurred. A novation is a legal term meaning that the old contract between the parties, in this case the September 1968 oral (C-196) agreement, is intentionally cancelled and can no longer be enforced when the parties sign the new agreement. This does not always happen automatically when parties to one contract subsequently sign another to do with the same subject matter. Rather, you must again look to the evidence and decide this question: *If you find that the parties entered into an oral agreement in September 1968, did* both the parties, in executing the SES Agreement, *intend* [to wipe out] *that* all their rights and obligations under the September 1968 oral agreement *be covered by the SES Agreement?* The crucial question again is intent. [If you find that one or both of the parties did not so intend, then there is no novation.]

Accordingly, if you find that *IBM,* at a time prior to the SES Agreement, became contractually obligated under an oral contract to provide all support services necessary to provide a totally integrated computerized system, including programs, *and* if you find further that, by their execution of the SES Agreement, the parties intended (to the extent that such services covered by such oral agreement were the same as or substantially similar to the services described in the SES Agreement) that the SES Agreement was to be substituted for such prior oral agreement, then the SES Agreement will be the only contract which you may consider in determining whether and to what extent *IBM* is liable to *Catamore* for breach of contract based on its alleged failure to furnish *Catamore* with a totally integrated computerized system.

(C-197) Conversely, if you find that the subject matter of the alleged oral contract was sufficiently differentiated from the subject matter of the SES Agreement, so that the latter was not intended as a substitute for the former, then you may consider such oral agreement in determining whether and to what extent *IBM* is liable to *Catamore* for breach of contract based on its alleged failure to furnish *Catamore* with a totally integrated computerized system.

[In addition to the question of the parties' intent, *Catamore* also argues that even if you find the SES was intended as a substitute, that it was fraudulently induced or innocently misled into entering that agreement based upon *IBM's* claim that the system was 90 per cent complete at that time. I have already charged you as to the necessary elements of fraud, that is, that you cannot find fraud unless

you find that *IBM,* through its agents, falsely represented that the system was 90 per cent complete* with knowledge or belief that such a representation was false [or with reckless disregard as to its truth or falsity]; that this representation involved material facts and that *Catamore* justifiably relied on that representation in deciding to enter into the SES Agreement. I also have charged you as to the elements of innocent misrepresentation. If you do so find, then I instruct you that due to *IBM's* fraud or innocent misrepresentation, *Catamore* would not be bound by the SES Agreement and it would not operate as a substitute for the earlier oral contract.]**

tim of innocent misrepresentation, prior oral agreement is not received. See attached memo C.

(C-198) As a general rule, a party, especially a party with experience in the business world who accepts and executes a written contract is presumed to know its terms and conditions and to have assented to such terms and conditions, in the absence of fraud, which must be clearly proven by the party alleging the fraud. Furthermore, it is the duty of every contracting party to be aware of the terms and conditions of a written contract before he signs and delivers the contract. If the contract is clear and definite in its language, he will be bound by its terms and conditions.

• • •

(C-205) The law permits the parties to a contract to limit or exclude warranties, whether express or implied, from the contract which they have made.

IBM takes the position that the only warranties relating to the computer hardware with respect to which *IBM* became contractually obligated are as specifically described in the Machine Service Agreement (relating to maintenance, repair and replacement) and that any warranties relating to systems engineering services are explicitly disclaimed and excluded by the SES Agreement. *IBM* maintains that there are no other warranties, whether express or implied, except as provided by the express terms of the written agreements.

I instruct you that these disclaimers are valid and enforceable as they relate to claimed breaches of the two written agreements unless you find the written agreement does not state the whole contract and there are oral warranties not in contradiction of the writing.

I further instruct you that these disclaimers have no application to the terms of any oral agreement or agreements that you find were created and not superseded by the SES Agreement as I have already charged.

(C-206) Members of the jury, if you find that *IBM* breached any warranties the SES Agreement, I must tell you that the SES Agreement limits the time period within which either *IBM* or *Catamore* could bring a legal action to recover for a breach of its terms. The SES Agreement provides that no action arising out of that agreement may be brought by either party more than one year after the cause of action has accrued, except that an action for nonpayment may be brought within one year of the date of last payment. *Catamore* commenced its countersuit against *IBM* on January 3, 1973.

(C-206) *Both Robert Catanzaro and Anna Mignanelli acknowledged that prior to December 31, 1971, Catamore had discovered deficiencies in the services which, according to Catamore, IBM had contracted to furnish to Catamore in connection with the MV/Vicario project.**

** Even if written agreement were rescinded at election of vic-

* Not accurate. IBM's letter said system *design* was 90% complete.

* *See*: Transcript of Proceedings as follows: Vol. X pp. 48-52; 37-38; 53-56A, 57-58, 59-60 (Robert Catanzaro) and Vol. XIV, pp. 103-121; 136-139; 154-157 (Anna Mignanelli).

The contractual limitation on the time in which *Catamore* must bring an action for breach of contract necessarily includes any claim for breach of warranty of the SES Agreement alone. If you find that *IBM* breached any warranty under the SES Agreement, whether express or implied, *and if you find there was an oral agreement between* CATAMORE *and IBM in September 1968 and such agreement was superseded by the SES Agreement in December 1969, then any action under either agreement is subject to the one year limitation, and* if you find that *Catamore's* cause of action for breach of such warranty or warranties accrued prior to January 3, 1972, then you must find in favor of *IBM* with respect to those claims.

(C-207) A cause of action for breach of warranty "accrues" when the party making the warranty breaches the warranty, not when damages are sustained as a result of the breach. A breach of warranty occurs when equipment is delivered or service is rendered (C-208) which does not conform to the warranty, except that where a warranty relates to future performance and discovery of the breach is not possible until at a later date, the cause of action based on the breach does not accrue until the breach is or should have been discovered.

You are instructed that such a limitation on the time within which to bring a legal action is valid and enforceable. [but only as to claims arising under the SES Agreement and only if you find that the SES Agreement itself is valid and binds both parties. In this regard I remind you that *Catamore* claims that it does not contend that the SES Agreement was breached, but rather, that its claims arise under one or more oral agreements which were not superseded by the SES Agreement. If that is so, as I have already instructed you, disclaimer of warranties and time limitations under the SES Agreement would have no effect on a separate oral agreement that was not merged into the SES Agreement.]

[Even if you find that the SES Agreement does supersede such earlier oral agreement, *Catamore* also argues that the entire SES Agreement, including its time limitations, must be considered null and void because *Catamore* was induced to enter into the SES Agreement by *IBM's* fraudulent or innocent misrepresentations. If you find that the SES Agreement was procured by *IBM's* fraud or innocent misrepresentation, you must disregard any time limitation and the SES Agreement in its entirety.] •

(C-210) Let us now consider *Catamore's* negligence claim.

• • •

(C-214) We now turn to the question of damages.

Therefore, if you find after consideration of all of the evidence, based on the previous instructions of the Court, that either or both of the parties are entitled to recover under any of their respective claims, then and only then shall you consider the question of damages, if any. If you find from the evidence that a party is not entitled to recover, then you must not consider the question of damages on that issue.

• • •

(C-221) If you find that *IBM* has breached any contract or contract warranty with *Catamore,* and if you find that *Catamore* has suffered actual damage as a direct result of the breach, then *Catamore* is entitled to damages for all harm naturally flowing from the breach and for such other items as were within the contemplation and understanding of the parties when they made the contract, *subject to the disclaimers and limitations as to damages contained in either of the written contracts, namely, the Machine Service Agreement and the SES Agreement, which I have called to your*

• See attached memo D and p. 27 *supra.*

attention, if the breach related to any matter which is within the scope of either of those written contracts.

• • •

(C-222) *In addition, you may award* CATAMORE *damages for prosepctive lost profits if you find (1) that* CATAMORE *lost profits as a direct result of that breach, (2) that* CATAMORE *proved both the fact that profits were lost and proved the amount of lost profits with reasonable certainty, (3) that* CATAMORE *and its related enterprises were sufficiently experienced enterprises to assure profits, (4) that lost* (C-223) *profits could have been reasonably foreseen by both* IBM *and* CATAMORE *at the time the contract was made, and (5) that such lost profits did not result from any transaction within the scope of either the Machine Service Agreement or the SES Agreement, if you find those agreements to be valid and binding.* (T-3799)

This instruction with respect to loss of profits relates only to the award of damages, if any, for breach of contract or contract warranty. I have already given you other instructions as to the award of damages, if any, based upon fraudulent misrepresentations.

• • •

(C-224) If you find that *IBM* breached any warranties under the SES Agreement, that are not *specifically disclaimed by that agreement* or barred by its time limitation as I have previously instructed you, I must tell you that the SES Agreement provides *further* for limitations on the amount of damages which can be assessed against *IBM* in the event of a breach.

• • •

(C-225) In addition, the SES Agreement provides that *Catamore* cannot recover consequential damages. I have already charged you as to what consequential damages are.

You are instructed that such a limitation on the total amount of *IBM's* liability is valid and enforceable, if you first find that the SES Agreement itself is valid and binding. However, such a limitation would be effective, if at all, only as to the determination of *Catamore's* damages for any breach of the SES Agreement. [In this regard I remind you that, according to *Catamore,* it does not ask for damages for breach of any SES warranties. Rather, as I have stated before, *Catamore* makes two arguments as to why this limitation of *IBM's* liability under the SES is ineffective. First, *Catamore* argues that the SES Agreement did not supersede the oral agreements which it claims were breached. If you so find, the SES limitation would not apply to those oral agreements. Second, even if you find the SES Agreement was a substitute for the earlier oral agreement, *Catamore* seeks to void the SES agreement on the ground that *Catamore* was either fraudulently induced or innocently misled by *IBM* to enter into the SES Agreement. If you find in favor of *Catamore* on the issue of fraud or innocent misrepresentation, I instruct you that you must then consider the SES Agreement (C-226) to be a nullity and disregard any limitations contained therein.]

• • •

(C-236) Mr. Foreman, madam and gentlemen of the Jury, I am about to place this case in your hands. This has been a long charge, and so I am going to give you six copies of it to take into the jury room with you, together with a form to be completed and signed by the foreman when you have reached (C-237) your decision.

APPENDIX K

THE JURY CHARGE
(6/18/75, C-268-C-337)

Because IBM's Objections [Appendix L] refer to page numbers of the original typed charge, those relating to contract issues are indicated by a right-hand margin notation.

Selected IBM-submitted instructions [Appendix G-J] which were given are indicated by a left-hand marginal notation.

[C-268]

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

INTERNATIONAL BUSINESS MACHINE CORPORATION

v.

CATAMORE ENTERPRISES, INC.

CHARGE TO JURY

Mr. Foreman, madam and gentlemen of the Jury, it is now the duty of the Court to instruct you in the law applicable to the cases which are about to be submitted to you. You will apply that law to the facts of the case as you, the jurors, determine those facts to be.

You have heard all of the evidence in this case, the testimony of the witnesses and you have before you the exhibits which you will take with you when you go to the jury room to deliberate. Both sides have rested so that the entire case, insofar as the evidence is concerned, is before you. Yesterday counsel argued their points of view to you. Both sides under our law have the right to argue and they have exercised that right. The arguments of counsel, however, do not constitute evidence. The arguments of counsel represent their points of view. They tell you what they think the evidence means; they [C-269] explain to you what they think the effect of the testimony is and they ask you to draw

certain inferences from that evidence. What the evidence is and what inferences you will draw is for you and you alone to determine.

Though you are required to accept the law as I give it to you and apply that law to the facts, you alone decide those facts because you are the sole trier of the facts.

In the course of these instructions you must not draw any inferences that from what I am saying there is an expression of a point of view as favoring one side or the other. You must reject such an idea — that is not my purpose. To convey any point of view would violate my solemn responsibility to always remain impartial and would invade the province of the jury. This is your verdict and your verdict alone based upon the law as the Court gives it to you and the evidence — as you find it to be.

Now, what do we have here? This is a civil case. Under our practice in a civil action, the plaintiff files a complaint, which outlines the plaintiff's claim against the defendant. In the complaint of this action, the plaintiff, *International Business Machine Corporation,* alleges that the defendant, *Catamore Enterprises, Inc.,* is indebted to it for goods and merchandise sold and delivered and for services rendered by it to the defendant.

The defendant *Catamore* denies the material allegations of *IBM* and counterclaims against *IBM*. The defendant, that is, [C-270] *Catamore,* alleges that the plaintiff, *IBM,* breached the contract, including breach of certain alleged warranties; made fraudulent representations and further acted in a reckless and negligent manner causing *Catamore* to lose business, customers and good will.

This case, therefore, actually consists of two separate cases. The first is set forth in the plaintiff's, that is, *IBM's,* complaint and the second in the defendant's, that is, *Catamore's,* counterclaims. In one case *IBM* is seeking to recover damages from *Catamore;* in the other, *Catamore* is seeking to recover damages from *IBM*.

It follows from what I have just told you that I must instruct you on the law as it pertains to contracts, warranties, fraud, negligence, agency, damages and certain other law including the burden of proof which I need not list at this time.

Now, in order for you to reach a decision in this case, madam and gentlemen of the Jury, it is necessary for you first to determine what are the facts, to determine from all of the evidence put before you which of the contentions of the adversary parties is the true contention. It is the function of the jury to consider the evidence introduced and to determine therefrom what are the facts. It is the duty of the Court to decide questions of law and to instruct you in the law applicable to the case, but it is for you to apply that law to the facts of [C-271] the case as you, the jurors, determine those facts to be. Therefore, the factual situation in this case, what actually happened, took place or transpired in respect to the occurrence or transaction

under consideration, this is to be determined by you and by you alone.

Please understand, however, that in determining what the facts in these cases are, you are to consider only that evidence which has been properly placed before you. It is the duty of the Court during the course of the trial to pass upon the admissibility of offered evidence, to decide whether or not offered evidence should be considered by you. Such evidence as the Court admits is properly before you for your consideration. Such evidence as the Court has refused to admit is not a proper subject for your deliberations and should not be given consideration by you. By the same token, evidence which may have been stricken from the record after you have heard it also does not constitute a proper subject for your deliberations and should be ignored and disregarded by you as though you had never heard it at all.

Papers, documents and charts admitted into evidence by the Court are a part of the evidence properly before you and will be available to you in the jury room for consideration during the course of your deliberations. Insofar as they may be pertinent or applicable, these exhibits are as much a part of the evidence before you as the testimony which you heard from the stand, and you will give each such weight as in your considerad judgment in the entire context of all of the facts proven at the trial it deserves.

[C-272] Now, I have told you this, and I repeat it, remarks or statements made by counsel in your presence during the course of the trial or in argument are not evidence and should not be considered as such by you during the course of your deliberations. From time to time counsel in arguing to the Court and in arguing to you in final summation may purport to recall what the testimony has been either generally or specifically. I am sure that in this case counsel here would do everything possible to make such recollections accurate and would not attempt deliberately to mislead you in any way.

It is each counsel's function to point out the salient features of counsel's case and to expand upon that with his recollection of the evidence. However, if your recollection should differ from that of counsel, it is your recollection which is controlling, not that of counsel's, and you should rely upon your recollection rather than that of counsel in reconstructing the evidence and testimony. By the same token, from time to time the Court may have, for the purpose of ruling on evidence, said, "It is my recollection that the testimony was thus and so." This was necessary for the Court to do in order to make a ruling. However, if your recollection differs from that of the Court, again your recollection, not that of the Court, is controlling.

The fact that the Court may have admitted evidence over objection should not be permitted to influence you in determining the weight that you will give to such evidence nor should statements made by counsel either for or against the admissibility of such evidence

influence your determination [C-273] of the weight that you will give the evidence if it is finally admitted. In other words, you should determine the weight that you will give to any item of evidence on the basis of your own consideration thereof and without regard to the ruling of the Court or the statements of counsel concerning the admissibility of such evidence. Neither should you permit objection by counsel to the admission of evidence or the rulings of the Court thereon or on any other subject to create any bias or prejudice in your minds with respect to counsel or the party which he represents. It is the duty of counsel to protect the rights and interests of his client and in the performance of that duty he may freely make objection to the admission of offered evidence or to any other matter upon which the Court is called upon to rule and should not in any manner be penalized therefor.

Similarly, although we are all aware that the trial of these cases took many weeks, I instruct you to draw no inferences as to the merits, strengths or weaknesses of the parties' respective claims from the length of time required to present them.

[C-274] In the remainder of my instructions I will have many occasions to refer to a party's "burden of proof." In general, one who advances a proposition has the burden of sustaining its validity. This, of course, is subject to the specific instructions that I will give you. The party without the burden is under no obligation to disprove that which is asserted or claimed by its opponent. Rather, the proponent must affirmatively prove that which it has asserted or claimed. The law further requires that the proponent prove that which it asserts or claims by a fair preponderance of the evidence. Where evidence adduced either for or against a given proposition outweighs contrary evidence, such evidence is said to preponderate. Therefore, proof by a fair preponderance of the evidence means proof by the greater weight of the evidence. That is to say, by such evidence as when weighed with evidence offered to oppose it has more convincing power in the minds of the jury. Now, you have all seen the lady of justice with the scales; proof by a fair preponderance of the evidence is such proof as will tip the scale perceptibly in the mind's eye of the jury. I trust you all understand that.

Although the burden is on the party who asserts the affirmative of an issue to prove his claim by a fair preponderance of the credible evidence in the case, this rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

[C-275] It is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if, after consideration of all the evidence in the case, the jurors believe that what is sought to be proved on that issue is more likely to be true than not to be true.

In determining whether the proponent of a claim has sustained the burden of proof im-

posed upon it by law you should not limit yourselves to a consideration of only that evidence produced by the proponent, for the proponent may establish the burden of proving its claims by the greater weight of the evidence on the basis of all of the evidence properly before you without regard to whether at trial it was produced by *IBM* or by *Catamore*. In other words, when an item of evidence is in, it is in for all purposes regardless of whether it helps or hurts the party who produced it.

For the purpose of determination upon which side the greater weight of the evidence lies you must give consideration to the opportunity of the witnesses to have acquired knowledge of that to which they testified, to their conduct and demeanor while testifying, to their interest or lack of interest, if any, in the outcome of the case and to the probability or improbability of the truth of their testimony. From these circumstances proved at the trial, you may determine upon which side the greater weight of the evidence lies.

[C-276] You are the judges of the credibility of witnesses, and the test for determination of credibility of witnesses is very similar to the test for determining where the greater weight of the evidence lies. You must determine the weight that you will give to the testimony of each witness. In considering the weight that you will give to the testimony of witnesses who appeared in Court, you may consider their demeanor in court as well as their actual testimony. "Demeanor" means the carriage, behavior, bearing and manner in which a witness testifies.

These instructions apply not only to ordinary witnesses who testify as to their observations and perceptions but also to expert witnesses. We have had expert witnesses in this case. How are you going to consider their testimony? Expert witnesses are considered by you in the same way that you would consider an ordinary witness with the exception, of course, that the expert witness is giving you an opinion and not an observation; but that opinion is evidence which you may consider just as you may consider the evidence of a lay witness's observation.

However, you are not controlled by the testimony of an expert witness or by the opinion which he gives you. You may accept the opinion of an expert witness if in your judgment in the light of all of the evidence produced at the trial this is the correct determination to make. The ultimate determination is yours to make. You are not controlled [C-277] by expert testimony, but you may and should take into account in arriving at your conclusions what he testified to. You may adopt the opinion of an expert witness entirely as your own or you may adopt it in part and reject it in part. Or you may reject such opinion altogether.

In considering an expert witness it is certainly your duty, your right, to take into account his qualifications, his background and

his experience. You may also take into account and should take into account the factual basis for his opinion and the assumptions that he has made. This is very important because if you reject an important part or material part of his factual basis, this should affect your consideration of his opinion. Also in determining expert witnesses and their credibility and the weight of their opinions, you should take into account, as you will with all other witnesses, all witnesses, the following tests: It is your right to consider the appearance of witnesses on the stand, their manner of testifying, their apparent candor and fairness, their interest or lack of interest in the outcome of the case, and their apparent intelligence or lack of intelligence. From these, together with all of the other facts and circumstances proved at the trial, you may determine which of the witnesses are more worthy of belief.

You are not required to believe that something is a fact merely because a witness has stated it to be a fact if in the [C-278] light of all of the evidence you believe that such witness is mistaken or has testified falsely as to the alleged fact. If you believe that any statement of any witness, expert or otherwise, proposes something which is inherently impossible when the statement is considered in the light of all of the evidence, you may disregard such statement even in the absence of any testimony contradictory thereto or of any evidence contradictory thereto. Where the testimony of one witness on a specific item of evidence is contradicted directly by the testimony of another witness and there is no third witness testifying on such item, you are not required to therefore consider that the evidence is evenly balanced or the item not proved. In such a situation you may determine which of the two witnesses you believe on the basis of all of the surrounding facts and circumstances proved at the trial and you may believe one such witness rather than the other if you believe that the facts and circumstances warrant it. We do not decide cases by counting noses of the witnesses. The rule is quality rather than quantity.

A witness may be impeached, that is, his credibility may be questioned by showing that on some prior occasion he or she made statements which are contradictory of the testimony given at the trial. If you believe from all of the evidence that any witness did at some prior time make statements contradicting his or her testimony at the trial, you may take this belief into consideration when determining the credibility of such witness or the weight that you will give to his or her testimony.

[C-279] During the trial of this case, certain testimony has been read to you from depositions, consisting of sworn written answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason, is not present to testify from the witness stand

may be presented in writing under oath, in the form of a deposition. Such testimony is entitled to the same consideration, and is to be judged as to credibility and weighed and otherwise considered by the jury insofar as possible, in the same way as if the witness had been present and had testified from the witness stand. However, the deposition of a witness who appears at trial which is used to contradict his testimony at trial is not to be considered as evidence of any facts or claims stated in that deposition.

The testimony of certain witnesses and charts or summaries prepared by them and admitted in evidence are received for the purpose of explaining facts disclosed by books, records, and other documents which are in evidence in the case. However, such charts and summaries are not in and of themselves evidence of proof of any facts. If you find that such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

From what I have said I do not and did not mean to imply that you should approach your consideration of these cases in an intellectual vacuum. You are not required to put aside [C-280] or to disregard your experiences and observations in the ordinary, everyday affairs of life. Indeed, your experiences and observations in the ordinary, everyday affairs of life are essential to your exercise of reasonably sound judgment and discretion in the course of your deliberations; and it is your right and duty to consider the evidence in the light of such experience and observations. It is for this reason that you are required to be at least eighteen years of age before being allowed to serve as a juror in the hope that you will bring into court with you the maturity of experience and common sense, and it is hoped and anticipated that you will sift all of the evidence in these cases through that maturity and common sense.

I will say that having talked about evidence, I should mention a word or two about circumstantial evidence and inferences. A part of the evidence in any case may be circumstantial. There may not be an eyewitness to the event in question, but circumstantial evidence may give rise to inferences upon which a determination is made. From a given fact reasonable inferences may be drawn by the jury.

Now, what do I mean by that? To give you an illustration of that, if I look at this window and see daylight coming through, it is a reasonable inference, though I cannot see through the wall, for me to conclude that the sun is shining; or assume you saw footprint, you could infer it was made by the heel of a man's shoe. This is what I mean by inferences.

[C-281] Let me tell you at the outset that neither *IBM* nor *Catamore* is restricted in seeking recovery of damages based on only one theory of liability. Each has the right to make a number of claims or theories of recovery. You have to consider the facts as to

each theory and apply to the facts of that theory, the law I give to you and grant to deny recovery on any one, more than one, all or none.

First, let me instruct you as to agency. The plaintiff in this case, *IBM Corporation,* and the defendant, *Catamore Enterprises, Inc.,* are each corporations, which are not persons but rather a creation of the law. Because of this, the only way that a corporation can act is through its officers and its duly authorized agents. The parties do not contest that the various witnesses who testified as officers or salesmen for the litigants were indeed agents of their respective companies. The point is that the corporations — *IBM and Catamore* — are wholly responsible for the contracts made by their authorized agents and their acts carried out within the scope of their employment. Futher, the law holds the corporation is liable for knowing all the facts its officers and agents know, even if the agent does not tell the corporation these facts. Putting it simply, a principal (here it means the corporation) is liable both for the acts and the omissions of duty of its agent, within the scope of his employment. Notice to such officer or agent in the [C-282] capacity for which he is employed is notice to the corporation.

IBM has not denied that Maury Davitt, Thomas Brassil, Kenneth Racette and Vincent O'Reilly, among others, were, at the itmes in question, authorized agents of *IBM,* so you must accept that they were so authorized. Similarly, you must accept that Robert and Christopher Catanzaro, among others, were, at the times in question, authorized officers or agents of *Catamore.*

[C-283] Some of *Catamore's* counterclaims allege that *IBM* through its agents made certain fraudulent misrepresentations to *Catamore,* which induced *Catamore* to enter into an agreement for the leasing of computer equipment (sometimes referred to as "hardware") and the supplying of certain support services (sometimes referred to as "software") and thereafter made certain fraudulent representations in order to retain *Catamore's* continued adherence to the contractual relationship and to obtain *Catamore's* acceptance of certain changes in the terms thereof. Under the law, it must be demonstrated, by a fair preponderance of the credible evidence, that, at the time the alleged representations were made, *IBM,* acting through its agents, clearly intended to commit, and did in fact commit, a fraud upon *Catamore*; otherwise *Catamore* cannot recover for the fraud alleged, and the jury should find for *IBM* with respect to such claims.

I will now state and define the several elements that are necessary to establish a cause of action in fraud.

First, *IBM,* acting through its agents, must have made one or more representations to *Catamore* (through its agents) which related to a matter of fact which either existed at or prior to the time the representation was

made. For the sake of convenience, I shall hereafter refer to the representation or representations at issue in the plural, although I charge you now that, if you find all other elements of fraud have been proven in accordance with my charge as to any one representation, only one such representation is necessary to establish fraud.

[C-284] Fraud cannot be predicated upon what amounts to a mere expression of opinion which is understood by the person to whom the representation is made to be only an opinion, or which cannot reasonably be understood to be anything else. Nor can an action for fraud be based on a prediction, statement or judgment made by the speaker or a promise to do something in the future. The person to whom such statements are made has no right to rely upon them and he does so at his peril. An exception to this rule occurs where at the time a promise to perform a future act is made, the party making it has no intention of performing the act which is promised.

Second, these representations must have in fact been false at the time they were made. I must caution you, madam and gentlemen, that although I have used the phrases "representations" and "when made", you may base a finding of fraud upon a party's failure to make any statement at all where a party has created a false impression in the mind of the other party by his acts or by concealment or suppression of material facts that were not equally within the knowledge or reach of the party who was misled.

Third, you must find scienter, or guilty knowledge, on *IBM's* part. That is, you must find that at the time the false representations were made, *IBM*, through its agents, knew or believed that the representations were false.

In this regard I remind you that, as a corporation, [C-285] *IBM* could act only through its agents and any knowledge obtained or act, statements or omission of an officer, employee or other agent of a corporation in the performance of his duties or within the scope of his authority is held in law to be that of the corporation. Thus, your focus in determining the question of *IBM's* scienter is not limited only to the knowledge possessed by those *IBM* agents who dealt directly with *Catamore*. You may also find scienter on *IBM's* part, if you find that corporate officers of *IBM* possessed knowledge of the falsity of the misrepresentations in question, even though you also find that such knowledge was not communicated to the agents who dealt directly with *Catamore*.

Fourth, you must find that in making the false representations, *IBM*, through its agents, intended to mislead *Catamore* and intended that *Catamore* would act in reliance upon the truth of the misrepresentations.

Let me caution you, members of the jury, that an agent for *IBM* could not have acted with intent to deceive if you find that, in making the representations in issue, he personally did not have "scienter", that is, that he did not knowingly misrepresent or conceal a material fact. So, if you find no guilty knowledge on the part of the *IBM* agents who

dealt directly with *Catamore,* their intent or desire that *Catamore* rely on any representations innocently made would not constitute the [C-286] "intent to deceive" necessary to prove fraud. It is still possible, as I have already charged you, to find such guilty knowledge on the part of *IBM* in acting through its corporate officers. If you do so find, but only as to them, then you must look only to their intent in transmitting false information or failing to transmit accurate information to other *IBM* agents. In order to find the intent to deceive necessary to show fraud in such a case, it is not necessary for you to find that the corporate officers had any specific knowledge as to *IBM's* relationship or dealings with *Catamore,* or that their action or inaction was specifically intended to affect *Catamore,* but rather it would have to be shown that the corporate officers acted or failed to act with the intent that parties in the same or similar position as *Catamore* would thereby be misled and would rely upon the representations made.

I further instruct you if you find *IBM,* through its agents, did intend to deceive *Catamore, IBM's* motivation, however honorable or wicked, in creating a false impression is not a necessary element of fraud. The question of motivation does, however, have same bearing on the question of punitive damages, which I will discuss later in my instructions.

To recap, by intent, I mean a misrepresentation which is intended to produce false belief in the mind of the person to whom the representation is made, with the intent that he will act on such misrepresentation.

Intent here does not mean that the party maliciously and hostility plotted to go about causing harm; rather, it [C-287] means that the party intended to bring about the result that the other party would be misled.

Fifth, before you can find fraud, you are required to find that the particular representation which you are considering involved material facts. A fact is material if it is of a kind which would affect the conduct of a reasonable man under the circumstances. For a statement to be material, you must find that the representation was one which could reasonably be expected to have a material or substantial influence on *Catamore* in inducing its actions. This influence must be significant, but need not be the sole or exclusive factor inducing *Catamore's* actions.

There is one exception to this "reasonable man under the circumstances" test of materiality. This exception applies if you find that *IBM,* through its agents, was aware that *Catamore* would be likely to find a special and unusual significance in the truth of the particular representation and that *IBM* sought to take advantage of this situation by making a false representation. In such a case, you should find that the particular representation was material even though you also conclude that a reasonable man would have found it unimportant.

Another element essential to *Catamore's* claim based on fraud is that the party to whom the representation was made must have

justificably [sic] relied upon it, that is, you must find that *Catamore* did in fact rely upon a particular misrepresen[C-288]tation and that such reliance was reasonable under the circumstances.

Reliance may be shown by direct evidence or it may be inferred from the circumstances of the transaction.

If you find that *Catamore* in fact relied on the misrepresentation, then you must consider whether that reliance was reasonable under the circumstances. For example, you may find that the statements made by *IBM* were part of a sales pitch and that *Catamore* should have been aware that the promises were false or at least grossly inflated. Or you might find *Catamore* actually was aware that the representations were false. In either case you should then conclude that *Catamore's* reliance on the representations would not have been reasonable.

On the other hand, you might find that *Catamore* was inexperienced in relation to *IBM* and also that *Catamore* was unable to inspect the items for which it was contracting prior to delivery. Under such circumstances you might conclude that it was justifiable for *Catamore* to rely on *IBM's* representations, even though if *Catamore* had made independent investigation, it would have exposed the falsity of the representation.

Finally, *Catamore* must show that it suffered harm or damages as a result of its reliance on the misrepresentations. This harm must be proximately connected or linked to the misrepresentation, that is the fraudulent misrepresentation must be the primary or major cause of *Catamore's* damages, although it need not be the sole or exclusive cause.

[C-289] I will instruct you as to the meaning of proximate cause more fully elsewhere in my charge.

Fraud is never presumed but must be clearly proved. The law presumes that every person transacts business honestly and in good faith, and the burden of proving fraud is on the party who alleges fraud. In this case the burden of proving fraud is on *Catamore*.

Fraud may be proven by circumstantial evidence showing subsequent or continued representations and evidence showing a given course of action, or the circumstances surrounding the transaction, or supplying a motive indicating intent.

You may rely on such evidence. However, I instruct you that where a question of fraud rests on circumstantial evidence, if there are two inferences equally reasonable and equally susceptible of being drawn from the proved facts, and one favors the inference of fair dealing while the other favors corrupt practice, it is your duty to draw the inference in favor of fair dealing.

To summarize, in order for *Catamore* to recover on the issue of fraud, you must find that each and every one of the following elements have been proven by a preponderance of the evidence:

1st, that IBM through its agents made certain representations of fact which were susceptible of actual knowledge and not merely opinions, or predictions;

[C-290] 2nd, that such representations were false when made.

3rd, that when the representations were made, the agent of *IBM* making them knew or believed that the representations were false, or, even though the agent making the representations believed them to be true, that *IBM,* through knowledge possessed by its corporate officers at the time the representations were made, knew they were false;

4th, that the representations were made with the intent to mislead *Catamore* or to convey a false impression and with the intention that *Catamore* act upon such representations;

5th, that the representations involved material facts;

6th, that *Catamore* acted in reliance upon such representations and was thereby damaged;

7th, that *Catamore's* reliance was justifiable.

[C-291] There are two basic remedies if you find fraud as to any one or more of these transactions. First, you may consider the agreement to be null and void, that is, without any effect on either party. This is the remedy *Catamore* seeks as to the two written agreements, that is, the Machine Service and SES Agreements. I remind you that *IBM* seeks to recover moneys it claims are due it under the Machine Services Agreement of September 1968. I instruct you now, that, if you find that *Catamore* was fraudulently induced to enter the Machine Service Agreement by *IBM,* then you must consider that contract to be a nullity and unenforceable and to find for *Catamore* on that issue.

On the other hand, if you find that *Catamore* was not fraudulently induced to enter into the Machine Services Agreement, I tell you now that *Catamore* argues the terms of that agreement and the SES Agreement as well are unenforceable by *IBM* on one other theory of law called innocent misrepresentation. This theory has some, but not all elements of the tort of fraud. *Catamore* argues, in addition to its claim of fraud, that you should apply this theory to the Machine Services Agreement and SES Agreement. Under Rhode Island and New York law, a misrepresentation of a material fact, as I have previously defined it, is grounds for the remedy we call "rescission", when the person to whom it is made relies on it and suffers harm from it. It does not matter [C-292] whether or not the person who made the untrue statement knew or intended to make it. The law will hold that person strictly liable for what he says, because the person who should bear the burden of the risk of falsehood is the speaker, not the victim.

Fraud and innocent misrepresentation are the only theories by which *Catamore* seeks to

defend *IBM's* claim for money due under the Machine Services Agreement. So, madam and gentlemen of the jury, if you find that *IBM* neither fraudulently induced nor innocently misled *Catamore* into entering that agreement, then your verdict as to *IBM's* claim for moneys due should be for the plaintiff, *IBM*.

IBM Objections

The second remedy available if you find for *Catamore* on an issue of fraud is an award of damages. This is the remedy *Catamore* seeks as to each of the two oral agreements it claims it made with *IBM* relative to the provision of software and support services for the *Catamore* and MV/Vicario enterprises. I will instruct you as to the showing which must be made in order for *Catamore* to prove the existence of one or both of these contracts.

T-3810

Let me say at this point that, assuming that you find an oral agreement to provide a production control system was made in September, 1968, *Catamore's* claim of fraud as to that oral agreement and the Machine Services Agreement must stand or fall together. This is so because *Catamore* claims that the same alleged misrepresentation of fact, that is, that *IBM* could provide *Catamore* a production control system to meet its needs, induced it to enter both agreements.

[C-293] Thus, if you find no fraud as to one of the two 1968 agreements, you must also find there was no fraud as to the other. For example, if you find no fraud as to the Machine Services Agreement, your next question as to that agreement insofar as it relates to *IBM's* claim for damages is — did *IBM* innocently misrepresent the facts to *Catamore* under the legal theory I just explained to you? If the answer is again no, you must find for *IBM* on its claim for moneys due. If it is yes, *Catamore* is relieved of liability and your verdict must be for *Catamore*.

If you conclude there was no fraud as to the Machine Services Agreement, you must also conclude either that there was no fraud as to the 1968 oral agreement, or no such agreement was ever made. If you decide there was no 1968 oral agreement, then you must disregard *Catamore's* claim of breach of contract as to this alleged contract, and consider only its claim of negligence on the part of IBM on which I will instruct you later.

On the other hand, if you find there was an oral agreement, although not fraudulently induced, you must consider *Catamore's* claims as to breach of contract as well as in negligence.

CONTRACT

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[C-294] Next let me take up contracts. This is an action for breach of contract by *IBM* against *Catamore* based upon *Catamore's* failure, as alleged by *IBM*, to pay to *IBM* the sum of $68,453.23, as se forth in an account of *Catamore's* indebtedness to *IBM*, for goods and merchandise sold and delivered and for services rendered by *IBM* to *Catamore*.

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This is also an action for breach of contract by *Catamore* against *IBM*, as set forth in the amended counterclaims filed by *Cata-*

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more, in which *Catamore* claims losses because of *IBM's* alleged failure to perform its contractual obligations to *Catamore*, including the fulfillment of certain alleged warranties about which I shall give you further instructions.

A breach of contract is a failure by a party to a contract to perform an obligation under the contract.

C-21 In September 1968, *IBM* and *Catamore* executed a written instrument which is entitled "Agreement for IBM Machine Service" and which has been received as an exhibit in evidence in this case and which has been referred to as the Machine Service Agreement.

C-21 *IBM* takes the position that, when this written agreement was signed by the parties, it was not only a complete contract between the parties which contained all of the terms and conditions relating to the machines to be fur- [C-295] nished by *IBM* to *Catamore* under the contract, but was also the only contract then in existence between them, whether written or unwritten.

Catamore, on the other hand, takes the position that the written agreement was only for hardware and was not the only contract made by the parties at the time. *Catamore* contends that there was another agreement, not in writing, made by the parties at that time for software for the production control system. T-3813

Members of the jury, in the federal system a judge may comment on the evidence. However, I prefer not to do so excepting where I may feel obligd to make some general

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statements in order to explain a point of law. On pain of undue repetition I again point out that you alone decide the facts. With that in mind, let me point out you have heard such witnesses as Maury Davitt, Thomas Brassil, Christopher and Robert Catanzaro, Dick Brandon, and so forth. In addition certain written documents were introduced to allegedly support the oral conversations and intent of the parties.

C-21 *Catamore* claims, that, at or about the time when the Machine Services Agreement was signed, the parties entered into an oral contract, whereby *IBM* promised to furnish *Catamore* with certain support services relating to the design, installation and performance of a totally integrated computerized system for *Catamore's* use in connection with the operation of the business. If, in accordance with my instructions on the law of contracts, you find that such an oral contract was made, you must determine what its terms [C-296] were on the basis of the evidence presented. T-3813

C-22 Both parties have presented evidence, much of it conflicting evidence, as to the nature and scope of their relationship in September 1968. In determining whether or not any oral promises were made on behalf of

C-23 *IBM* to *Catamore*, and what they were, you should consider the evidence before you what was actually said and done by each of the parties in relation to the other. If contractual obligations were created, it is necessary for you to find that they were created as the result of promises, which were clearly expressed and reasonably understandable. The

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law does not create a contract from the assumptions of one of the parties, uncommunicated to the other party from whom performance is expected, nor does liability for breach of contract arise from the disappointed expectations of that party where there was no mutual agreement in the first place.

C-23

C-191 Intention to contract is a factual issue the test for which is not the real intention of a party but rather whether his conduct would lead a reasonable man to believe that he intended to contract.

This now brings us to the question of consideration. I have told you that for the oral agreement to be binding there must be consideration. By the term "consideration" we mean that there must be some benefit to the party making the promise, which that party desired and which both parties bargained for and agreed to as part of the contract between them. Otherwise, the promise would be simply a gratuitous [C-297] promise, without consideration, and the law will not compel the performance, or provide a remedy for the nonperformance of a promise for which there is no consideration.

The law finds consideration for contracts in many things: it is not just money for services: consideration can be found in mutual promises where each party promises to do something as part of its bargain with the other. For example, you could find consideration in two parties' agreement to enter into one contract which is conditioned upon their agreement to enter into another contract as well. Or you could find consideration in a

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buyer's forbearance from going to another seller to buy his version of a product included in the bargain with the seller; or where a party, in reliance upon the promise of the other party, changed his position to his detriment in a way he normally would not have.

C-191

Simply speaking, madam and gentlemen of the jury, if you find that *IBM* and *Catamore* did not enter into an oral contract whereby *IBM* was to provide support services to *Catamore*, or that such an agreement, if made, was not supported by consideration, then I instruct you to find that the written Machine Service Agreement was the only contract in existence between the parties in September 1968.

However, even if you find that, prior to or contemporaneously with the execution of the Machine Service Agreement, *IBM* and *Catamore* entered into an oral agreement with respect to support services, if you also find that the subject matter of that oral agreement was so closely related to the Machine Service Agreement that parties in the situation of *IBM* and *Catamore* would reasonably expect to include the terms of the oral agreement in their written agreement, then, as they did not do so, you must disregard the oral agreement, because under a rule of law, the agreements between the parties have been integrated in the written contract and the oral agreements have no legal effect. However, if you find that *IBM* did not normally reduce software contracts to writing, this rule does not apply.

C-24

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C-193

If you determine that in September 1968 a separate oral agreement was created in addition to the Machine Services Agreement, that there was consideration for the contract, and that the terms were clearly expressed and reasonably understandable, you must then decide if, as *Catamore* claims, *IBM* breached any one or more of its terms.

C-193-4

One of *Catamore's* claims against *IBM* for breach of contract is based on *IBM's* alleged failure to deliver on time the computer equipment and accessories (the "hardware") ordered by *Catamore* and to furnish at all the support services, as alleged by *Catamore* (the "software"). However, it is *IBM's* position that the time for any such performance was postponed at *Catamore's* request and also as a result of additional requirements imposed upon *IBM*. If you find that such performance by *IBM* was postponed by agreement of the parties or because of additional requirements im[C-299]posed by *Catamore* upon*IBM* then you shall find that *IBM* did not breach its contract with *Catamore* with respect to the time of performance.

C-194

On the other hand, *Catamore* claims that it did not, by consenting to the postponement of delivery of hardware at its plant, intend also to consent to delay the software beyond January 1, 1970, and that, at most, the postponement of hardware delivery was only until September 1, 1970. Again, you must consider from the evidence what the terms of this agreement to delay were, and what the

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intent of the parties was at that time. Additionally, even if you find the parties intended that this postponement apply to delivery of software, in looking for a waiver, you must consider whether *Catamore* has proved its claim that its assent to a postponement was induced by fraud or an innocent misrepresentation, as I have defined those terms, on the part of *IBM*, and that, as a result, *Catamore* is not bound by the agreement to postpone delivery.

As you know there were two written contracts executed by the parties. The first was in September 1968, referred to as the "Machine Services Agreement." The second was on December 9, 1969 and entitled "Agreement for IBM Systems Engineering Services." I shall call this the "SES Agreement."

C-27

The SES Agreement states that it shall cover all assistance in the installation and use of data processing products by *IBM's* systems engineering personnel at *Catamore's* request, including, but not limited to, special studies, programming and application design and development, systems analysis and design, conversion and implementation planning, and installation evaluation.

[C-300] Now *IBM* takes a dual position. First it denies outright that there was any oral contract made by *Catamore*; but if you should find that there was such an agreement in accordance with the instructions I have just

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given you, then *IBM* argues those services which had not been provided by *IBM* up to the time of the SES Agreement are covered by the SES Agreement and that this SES Agreement was substituted for and thereby superseded any earlier agreement relating to services.

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C-195 If you find that *IBM* and *Catamore* by executing the SES Agreement intended that the SES Agreement intended that the SES Agreement was to be substituted for the prior oral agreement, then you must disregard any claim that the earlier oral contract was breached and look only to the SES Agreement because in such event the SES Agreement will be the only contract which you may consider in determining whether and to what extent *IBM* is liable to *Catamore* for breach of contract based on its alleged failure to furnish *Catamore* with a totally integrated computerized system.

C-195, C-27 It is undisputed that, on December 9, 1969, *IBM* and *Catamore* entered into a second written contract, which has been received in evidence as an exhibit in this case and referred to as the SES Agreement.

C-195, C-78 The SES Agreement states that it shall cover all assistance in the installation and use of data processing products by *IBM's* systems engineering personnel at *Catamore's*

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[C-301] request, including, but not limited to, special studies, programming and application design and development, systems analysis and design, conversion and implementation planning, and installation evaluation.

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C-196 It is *IBM's* position that by signing this document, a novation occurred. A novation is a legal term meaning that the old contract between the parties, in this case the September 1968 oral agreement, is intentionally cancelled and can no longer be enforced when the parties sign the new agreement. Novation does not always happen automatically when parties to one contract subsequently sign another to do with the same subject matter. Rather, you must again look to the evidence and decide this question: Did both the parties, in executing the SES agreement, *intend* that all their rights and obligations under the September 1968 oral agreement be covered by the SES Agreement. The crucial question again is intent. If you find that one or both of the parties did not so intend, then there is

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C-28 Accordingly, if you find that *IBM,* at a time prior to the SES Agreement, became contractually obligated under an oral contract to provide all support services necessary to provide a totally integrated computerized system, including programs, *and* if you find further that, by their execution of the SES Agreement, the parties intended (to the extent [C-302] that such services covered by such oral agreement were the same as

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	or substantially similar to the services described in the SES Agreement) that the SES Agreement was to be substituted for such	
C-28	prior oral agreement, then the SES Agreement will be the only contract which you may consider in determining whether and to what extent *IBM* is liable to *Catamore* for breach of contract based on its alleged failure to furnish *Catamore* with a totally integrated production control system.	
C-28-29 C-78	Conversely, if you find that the subject matter of the alleged oral contract was sufficiently differentiated from the subject matter of the SES Agreement, so that the latter was not intended as a substitute for the former, then you may consider such oral agreement in determining whether and to what extent *IBM* is liable to *Catamore* for breach of contract based on its alleged failure to furnish *Catamore* with a totally integrated computerized system.	
	In addition to the question of the parties' intent, *Catamore* also argues that even if you find the SES was intended as a substitute, that it was fraudulently induced or innocently misled into entering that agreement based upon *IBM's* claim that the system was 90 per cent complete at that time. I have already charged you as to the necessary elements of fraud, that is, that you cannot find fraud unless you find [C-303] that *IBM*, through its agents, falsely represented that the system was 90 per cent complete with knowledge or belief that such representation was false; that this representation involved material facts and that *Catamore* justifiably relied on that representation in deciding to enter into the SES Agreement. I have also charged you as to the elements of innocent misrepresentation. If you do so find, then I instruct you that due to *IBM's* fraud or innocent misrepresentation, *Catamore* would not be bound by the SES Agreement and it would not operate as a substitute for the earlier oral contract.	T-3810 T-3815
C-43	As a general rule, a party, especially a party with experience in the business world who accepts and executes a written contract is presumed to know its terms and conditions and to have assented to such terms and conditions, in the absence of fraud, which must be clearly proven by the party alleging the fraud. Furthermore, it is the duty of every contracting party to be aware of the terms and conditions of a written contract before he signs and delivers the contract. If the contract is clear and definite in its language, he will be bound by its terms and conditions.	
	In concluding this aspect of the instructions as it pertains to contracts I also call to your attention that *Catamore* also claims damages on an alleged contract for the MV/Vicario system. All the instructions I have given you apply equally to this portion of the dealings between the parties.	T-3810 T-3815
	[C-304] Now we come to the question of warranties. We have just gone over contracts: a contract may sometimes include warranties given by one or both of the parties in con-	

nection with their agreement. Generally speaking a warranty is a promise, written or unwritten, that a fact or facts in relation to the subject matter of the contract is now or will be in the future of a nature or quality as promised. A warranty may be an express warranty, that is, a warranty created by the explicit statements of the party to be bound.

As to express warranties I instruct you that not every statement that is made about the subject matter of a contract amounts to an express warranty. In order to prove the existence of an express warranty, *Catamore* must establish by a fair preponderance of the credible evidence that *IBM* made a statement or statements to *Catamore* which affirmed certain facts to be true relating to the computer equipment and accessories (hardware) and/or the support services (software) covered by the contracts between the parties and thereby promised (at the time when each such contract was made) that the hardware and/or software would conform to the affirmation; that such affirmation induced *Catamore* to enter into the contractual relationship with *IBM;* and that, in reliance on such express warranty, *Catamore* did in fact enter into the contractual relationship with *IBM*.

[C-305] This reliance must be significant, but need not be the sole or exclusive reason for making the contract. By way of distinction, I would point out, members of the jury, that unlike an action in fraud, an action for breach of express warranty does not require that you find intent to deceive or scienter, that is, knowledge, of falsity on *IBM's* part.

To constitute an express warranty, a statement must be one of fact. If the statement alleged by *Catamore* to be a warranty was simply the statement of an opinion, and the ordinary prudent businessman would so consider it as only an opinion, then you must find that no express warranty was made.

In determining what warranties, if any, were made by *IBM* and relied upon by *Catamore* in selecting the model 360-20 BC-4 computer, you are instructed that you may consider only those statements made prior to or contemporaneously with the execution of the Machine Service Agreement or prior to or contemporaneously with the creation of the September 1968 oral agreement to provide support services, if you find one was made. Any subsequent communications by the parties are irrelevant in deciding what the parties agreed to and relied on when *Catamore* agreed to lease the 360-20 BC-4 computer.

In other words, in deciding these questions you look to the time when the contracts were supposedly made. I [C-306] must further instruct you because of certain facts developed in this case that you are not to infer that *IBM* made any express warranties or became obligated to furnish support services, prior to entering into the SES Agree-

ment, simply from the fact that *IBM* may have volunteered to provide *Catamore* with some support services. *IBM* has admitted that it volunteered and provided such assistance in certain areas of support but denies that such support was pursuant to a contractual commitment on its part prior to January 1, 1970, the date that support services were available for a charge under the written SES Agreement. Without commenting on the weight of the evidence, I instruct you that such voluntary assistance is not inconsistent with the fact that *IBM* actually provided such assistance prior to January 1, 1970. Manufacturers are free to lend advice and assistance to their customers in matters within their general knowledge, gained from their experience, without, in the absence of a promise so to do, guaranteeing the result.

Now, by way of review as to express warranties I instruct you as follows:

Subject to the limitations in the foregoing instructions, *IBM* is not liable to *Catamore* for breach of express warranty in this case unless *Catamore* establishes by a fair preponderance of the credible evidence each of the following elements:

1. That *IBM*, through its agents, in fact made the [C-307] statement or statements as alleged by *Catamore*.

2. That such statements amounted to an express warranty in accordance with my previous instructions.

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3. That *Catamore* relied on the warranty and was induced to enter the contract in reliance on the warranty.

4. That the item delivered by *IBM* to *Catamore* or the service furnished by *IBM* to *Catamore* was not in substantial conformity with the alleged warranty.

5. That the alleged breach of warranty directly contributed to the loss or damage as claimed by *Catamore*.

C-205

The law permits the parties to a contract to limit or exclude warranties from the contract which they have made.

IBM takes the position that the only warranties relating to the computer hardware with respect to which *IBM* became contractually obligated are as specifically described in the Machine Service Agreement (relating to maintenance, repair and replacement) and that any warranties relating to systems engineering services are explicitly disclaimed and excluded by the SES Agreement. *IBM* maintains that there are no other warranties except as provided by the express terms of the written agreements.

I instruct you that these disclaimers are valid and enforceable as they relate to claimed breaches of the two written agreements unless you find the written agreement does not state the whole contracts *and*, there were oral warranties not in contradiction of the writing.

C-205

[C-308] I further instruct you that the disclaimers have no application to the terms of any oral agreement or agreements that you

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——find were created and not superseded by the SES Agreement as I have already charged.

C-206 Members of the jury, if you find that *IBM* breached any warranties under the SES Agreement, I must tell you that the SES Agreement limits the time period within which either *IBM* or *Catamore* could bring a legal action to recover for a breach of its terms. The SES Agreement provides that no action arising out of that agreement may be brought by either party more than one year after the cause of action has accrued, except that an action for nonpayment may be brought within one year of the date of last payment. *Catamore* commenced its countersuit against *IBM* on January 3, 1973.

This contractual limitation on the time in which *Catamore* must bring an action for breach of contract necessarily includes any claim for breach of warranty of the SES Agreement alone. If you find that *IBM* breached any warranty under the SES Agreement, (T-3815) *and* if you find that *Catamore's* cause of action for breach of such warranty or warranties accrued prior to January 3, 1972, then you must find in favor of *IBM* with respect to those claims.

C-207-8 A cause of action for breach of warranty "accrues" when the party making the warranty breaches the warranty, not when damages are sustained as a result of the breach. A breach of warranty occurs when equipment is delivered [C-309] or service is rendered which does not conform to the waranty, except that where a warranty relates to fu-

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——ture performance and discovery of the breach is not possible until at a later date, the cause of action based on the breach does not accrue until the breach is or should have

C-208 ——been discovered.

You are instructed that such a limitation on the time within which to bring a legal action is valid and enforceable, but only as to claims arising under the SES Agreement and only if you find that the SES Agreement itself is valid and binds both parties. In this regard I remind you that *Catamore* claims that it does not contend that the SES Agreement was breached, but rather, that its claims arise under one or more oral agreements which were not superseded by the SES Agreement. If that is so, as I have already instructed you, disclaimer of warranties and time limitations under the SES Agreement would have no effect on a separate oral agreement that was not merged into the SES Agreement.

Even if you find that the SES Agreement does supersede such earlier oral agreement, *Catamore* also argues that the entire SES Agreement, including its time limitations, must be considered null and void because *Catamore* was induced to enter into the SES Agreement by *IBM's* fraudulent or innocent misrepresentations. If you find that the SES Agreement was procured by *IBM's* fraud or innocent misrepresentation, you must disregard any time limitation and the SES Agreement in its entirety.

IBM Objections

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T-3810

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T-3810
T-3815

[C-310] Let us now consider *Catamore's* negligence claim.

Catamore also seeks to recover from *IBM* on a theory of negligence. Negligence is the failure of one person acting in a given set of circumstances to exercise that degree of care for the safety of another's person or property by which a reasonably prudent man would have exercised in the same or similar circumstances. Negligence may also result from not doing something that a reasonably prudent person would have done in the same or similar circumstances. Thirdly, you may have negligence where a person does something the reasonably prudent person would not have done under similar circumstances. So the question which you have to decide in this case concerning negligence is whether *IBM's* personnel acted as reasonably prudent men in dealing with *Catamore.* If your answer is that a reasonably prudent man would not have done what *IBM* personnel did, then *IBM* must be found negligent.

What does the law mean here by "reasonable"? Reasonable care is a degree of care which depends upon the circumstances and varies with them. It is such care as prudent men would ordinarily use in the circumstances which call for its use. The degree of care that would be reasonable in driving through a street in its ordinary circumstances might fall far short of being reasonable if the street was full of small children just let out of school. The care which would be reasonable in managing a sailboat in ordinary circumstances might not be reasonable in a gale of wind. The duty of care increases with the increase of danger.

[C-311] In other words, the greater the danger to *Catamore,* the higher the degree of care was to *IBM* in order to meet what we call "ordinary care of the reasonably prudent man."

You have heard testimony about what was the custom in the data processing industry. You may consider evidence of the usual and customary conduct of others in the industry as an indication of what the industry regarded as proper and reasonable. However, compliance with custom does not necessarily demonstrate freedom from negligence, but is rather a circumstance to be considered and weighed with all other factors in determining the reasonableness of *IBM's* conduct.

The law also requires you to examine another facet of negligence: that is, whether the lack of due care on *IBM's* part proximately caused the injuries that *Catamore* claims occurred as a result of *IBM's* negligence. I have had occasion to use the phrase "proximate cause" earlier in my charge, and this is perhaps a good place to define it. Proximate cause means a cause which, in a natural, unbroken and continuous sequence, produced the injury or injuries of which complaint is made. A cause, to be a proximate cause, need not be the sole or only cause or even the last or nearest. A cause is still considered "proximate"

even if it concurs with or unites with some other subsidiary cause, acting at the same time and in combination with other unrelated causes, so long as there is one related chain extending from the lack of due care of *IBM* to the harm suffered. As long as the chain from the negligent act or omission to the injury complained of is continuous, the amount of time [C-312] intervening will not alone defeat a finding of proximate cause.

So far I have instructed you as to what *Catamore* must prove to show that *IBM* alone was negligent. Suppose you conclude that any injury to *Catamore* was the proximate result, in part, of its own negligence as well as partially that of *IBM*? Well, in Rhode Island the theory of comparative negligence has been adopted. The law provides that in an action brought for damages to property, or person with control over the property, may not have been in the exercise of due care shall not bar recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the owner of the property, or the person having control over the property.

That is to say if you find that both *IBM* and *Catamore* were negligent aand that it was the combined negligence of both that proximately caused the injury to *Catamore,* you must compare the negligence of each in determining the amount of damages to be awarded.

I will instruct you as to how you are to determine that amount in the damage aspect of my instructions.

To recap, you have three points to consider on *Catamore's* claim in negligence:

1. If you find the injury to Catamore was proximately caused *solely* by the negligence of *IBM,* then of course your verdict must be for *Catamore* in the full amount of the damages as you find them to be.

2. If you find that *IBM* was not negligent or that *IBM* was negligent, but such negligence was not a proximate cause of any injury or damage sustained by *Catamore,* then of course your verdict must be for *IBM* on this issue.

3. If you find from a preponderance of the evidence in the case, that *IBM* was guilty of negligence which caused, in whole or in part, any injury or damage to *Catamore;* and should you further find, from a preponderance of the evidence in the case, that *Catamore,* itself was guilty of some contributory negligence which contributed toward bringing about all or part of its own injury; then you apply the law of comparative negligence as I have just given you.

[C-314] We now turn to the question of damages.

Before you can consider an award of damages to either or both of the parties in this case, the party to be awarded damages must have established the liability of the other party, with respect to the claim on which such damages are to be awarded, by

a fair preponderance of the credible evidence and in accordance with the previous instructions of the Court.

Therefore, if you find after consideration of all of the evidence, based on the previous instructions of the Court, that either or both of the parties are entitled to recover under any of their respective claims, then and only then shall you consider the question of damages, if any. If you find from the evidence that a party is not entitled to recover, then you must not consider the question of damages on that issue.

You are not to infer from the fact that instructions with respect to damages are given that the Court is in any way instructing you to assess or not to assess damages. The question of whether or not damages are to be assessed is for your consideration. As had been previously stated, you must first determine liability before you may in any way consider damages.

The amounts claimed as damages by each of the parties in their respective pleadings, that is, by *IBM* in its complaint and by *Catamore* in its amended counterclaims, are not to be considered by you as evidence of the damages, if any, suffered, nor shall any such com[C-315]plaint or counterclaims be taken by you as indicating that either party is entitled to any damages whatsoever. Here again, each party has the burden of proving its damages with respect to its claims.

The amount of any damages alleged to have been suffered by *IBM* as claimed in its complaint and by *Catamore* as claimed in its amended counterclaims, must be proved by each claimant to a reasonable certainty based upon evidence from which just and reasonable inferences can be drawn. You may not speculate or guess as to the amount that you will award as damages. You must base that amount upon your consideration of the evidence before you and it is required insofar as humanly possible that you determine the precise amount which in your considered judgment constitutes a fair and adequate compensation for such damages as you find have been proved.

If either of the parties is entitled to recover damages, the amount of such damages must be established with reasonable certainty.

The amount of the damages allegedly suffered by *IBM* is set forth with reasonable certainty in the account annexed to the complaint, which recites that the sum of $68,453.23 is due and owing for goods and merchandise. The accuracy of this amount has not been challenged by any evidence presented by *Catamore*.

[C-316] As to the damages claimed by *Catamore*, I must tell you that the way in which these are to be measured, if any are to be awarded, is governed to some extent by the legal grounds for recovery. I instruct you now, however, that if you find *Catamore* is entitled to recover damages under more than one theory of liability, you may not award more than the total amount actually suffered, that is, you may not multiply the amount

of damages suffered by the number of grounds of liability.

[C-317] First, as to damages under fraud:

Let me remind you that a party upon proving fraud, will become entitled to all damages which proximately flow from the fraudulent contract, or the party may avoid the contract, that is, assert that the contract is void and the defrauded party is therefore not bound by it. In the present case, *Catamore* seeks to avoid all agreements except the initial September, 1968 oral agreement and the initial March, 1970 MV Agreement, which *Catamore* claims were made. As to these two alleged contracts, *Catamore* instead asks for all damages proximately caused by the alleged frauds on which these contracts are based, in addition to damages for the subsequent breaches of these contracts.

It is as to these latter two agreements, claimed by *Catamore* to exist, that these instructions are addressed on the issue of how you, the jury, are to determine the amount of damages in the event you find that they were fraudulently induced.

If you find that *IBM* made fraudulent misrepresntations, and if you find that *Catamore* suffered actual pecuniary loss as a direct result of *IBM's* fraudulent misrepresentations to *Catamore*, then you shall award *Catamore* that sum of money equal to the difference between the actual value of *IBM's* services and the price *IBM* charged *Catamore* for its services. In other words, *Catamore* is entitled to the amount that it is "out of pocket" by reason of the fraud.

[C-318] In addition, *Catamore* would be entitled to consequential damages, which are defined as all the damages naturally and necessarily resulting from the fraud. If you find the required proximate causation, an award of consequential damages includes all the money and time *Catamore* put into the business in relation to the agreement; costs of the data processing department, rental of alternative equipment; cost of extra sales force, loss of customers, lost goodwill and actual loss of profits, so long as each of these have been proved to a reasonable certainty. The value of what *Catamore* lost as a result of the various frauds must be judged by you in light of subsequent events; so long as the fraud continued to operate, *Catamore* is entitled to damages. This would include the losses and expenses incurred, even after the *IBM* leased equipment was removed from the premises, if you find that such expenses were proved to a reasonable certainty and proved to be the proximate result of fraud.

However, you must find that all such damage was the direct and not the remote result of *IBM's* fraudulent misrepresentation. In other words, nothing shall have occurred between the fraudulent misrepresentation and the damages over which *IBM* had no control. There must have been no intervening occurrence such as negligence or lack of ability on the part of *Catamore*. For example, if you find that *Catamore* suffered damages but

that such things as lack of industry by *Catamore* employees, the caliber of *Catamore's* competitors, the market for the raw materials and other fluctuating costs, charges [C-319] and expenses and such were major factors which contributed to *Catamore's* damages, then you should conclude that such damages were not proximately caused by *IBM's* fraudulent conduct.

[C-120] Turning to the measure of damages for breach of contract, I instruct you that if you find that *Catamore* has without justification breached its contract with *IBM* to pay the amount claimed by *IBM* for goods and merchandise, then you shall award to *IBM* as damages the sum of $68,453.23.

If you find that *IBM* has breached any contract or contract warranty with *Catamore*, and if you find that *Catamore* has suffered actual damage as a direct result of the breach, then *Catamore* is entitled to damages for all harm naturally flowing from the breach and for such other items as were within the contemplation and understanding of the parties when they made the contract.

In determining whether damages suffered by *Catamore* were proximately caused by *IBM's* breach of contract or contract warranty, that is, if they flowed or resulted directly and not remotely from *IBM's* breach, I instruct you that here must have been no intervening occurrence over which IBM had no control between the breach and the damages. Examples of intervening occurrences could be the lack of reasonable effort or carelessness displayed by *Catamore's* employees, the caliber of its competitors, a drop in the market for its type of products, or fluctuating costs, charges and expenses.

IBM Objections

For breach of contract or contract warranty to be the proximate cause of a loss, the evidence must prove that *Catamore* and *IBM* foresaw or could have foreseen the damages alleged at the time the contract was made. In other words, in September, 1968, [C-321] *Catamore* and *IBM* should have foreseen or did foresee the losses alleged to have been suffered as a result of *IBM's* alleged breach of the contract or contract warranty.

Keeping these limitations in mind, I charge you that you may consider as damages expenses incurred by *Catamore* in preparation for performance by *IBM* of its obligations under their contracts, plus commissions, salaries and administrative expenses connected with the contract. You may consider as well actual losses of net profits.

T-3818

In addition, you may award *Catamore* damages for prospective lost profits if you find: (1) that *Catamore* lost profits as a direct result of that breach and (2) that *Catamore* proved both the fact that profits were lost and proved the amount of lost profits with reasonable certainty, (3) that *Catamore* was a sufficiently experienced enterprise to assure profits, and (4) that the damages or lost profits could reasonably have been foreseen by both *IBM* and *Catamore* at the time the contract was made, and

(5) that such lost profits did not result from any transaction within the scope of either the Machine Services Agreement or the SES Agreement, in the event you find those agreements to be valid and binding.

This instruction with respect to loss of profits relates only to the award of damages, if any, for breach of contract or contract warranty. I have already given you other instructions as to the award of damages, if any, based upon fraudulent misrepresentations.

[C-322] As to how you are to determine the amount of loss in prospective profits, if any, *Catamore* has introduced evidence of profit projections. You may rely on these projections only if you find from the evidence that a projection or forecast of profits presented by *Catamore* or its witnesses is reasonably based on fact. In that case, you may then consider the projection or forecast in determining the amount of lost profits, if any, which directly resulted from *IBM's* breach of contract or contract warranty.

You must be able to determine the amount of lost profits with reasonable, but not mathematical or absolute certainty. In order to be reasonably based in fact, *Catamore* or its witnesses must have disclosed the factual data and underlying assumptions from which the projection or forecast was composed, so that the accuracy of the underlying figures and factual assumptions and the validity of the conclusions of the profit projection could be tested. If you find there is no reasonable basis for a profit projection, you must not consider such profit projection in determining the amount of lost profits, if any.

This instruction with respect to projection or forecast of profits relates only to the award of damages, if any, for breach of contract or contract warranty. I have given you other instructions as to the award of damages, if any, based upon fraudulent misrepresentations.

[C-323] If you find that *IBM* breached any warranties under the SES Agreement, that are not barred by its time limitation as I have previously instructed you, I must tell you that the SES Agreement provides for limitations on the amount of damages which can be assessed against *IBM* in the event of a breach. Under this provisions, the total amount of damages awarded to *Catamore*, if any, shall not exceed the total amount paid by *Catamore* for services provided under the SES Agreement. T-3818

In addition, the SES Agreement provides that *Catamore* cannot recover consequential damages. I have already charged you as to what consequential damages are.

You are instructed that such a limitation on the total amount of *IBM's* liability is valid and enforceable, if you first find that the SES Agreement itself is valid and binding. However, such a limitation would be effective, if at all, only as to the determination of *Catamore's* damages for any breach of the SES Agreement. In this regard I remind you that, according to *Catamore*, it

does not ask for damages for breach of any SES warranties. Rather, as I have stated before, *Catamore* makes two arguments as to why this limitation of *IBM's* liability under the SES is ineffective. First, *Catamore* argues that the SES Agreement did not supersede the oral agreements which it claims were breached. If you so find, the SES limitation would not apply to those oral agreements. Second, even if you find the SES Agreement [C-324] was a substitute for the earlier oral agreement, *Catamore* seeks to void the SES Agreement on the ground that *Catamore* was either fraudulently induced or innocently misled by *IBM* to enter into the SES Agreement. If you find in favor of *Catamore* on the issue of fraud or innocent misrepresentation, I instruct you that you must then consider the SES Agreement to be a nullity and disregard any limitation contained therein.

Similarly, if you find that *IBM* breached any warranties under the Machine Services Agreement, I must tell you that the Machine Services Agreement also provides for limitations on the amount of damages which can be assessed against *IBM* in the event of a breach. Under these provisions, the total amount of damages awarded to *Catamore*, if any, shall not exceed the total amount paid by *Catamore* for items provided under the Machine Services Agreement. T-3818

In addition the Machine Services Agreement provides that *Catamore* cannot recover consequential damages. I have already charged you as to what consequential damages are.

IBM Objections

You are instructed that such a limitation on the total amount of *IBM's* liability is valid and enforceable, if you first find that the Machine Services Agreement itself is valid and binding. However, such a limitation would be effective, if at all, only as to the determination of *Catamore's* damages for any breach of the Machine Services Agreement. In this regard I remind you that, according to [C-325] *Catamore,* it does not ask for damages for breach of any Machine Services warranties. Rather, *Catamore* seeks only to void the Machine Services Agreement on the ground that *Catamore* was either fraudulently induced or innocently misled by *IBM* to enter into this agreement. If you find in favor of *Catamore* on this issue of fraud or innocent misrepresentation, I instruct you that you must then consider the Machine Services Agreement to be a nullity and disregard any limitation contained therein. T-3810

[C-326] If, in accordance with my instructions, you find that *IBM* was negligent with respect to *Catamore,* then *Catamore* is entitled to damages for all harm reasonably foreseeable at the time the negligent act was committed, and which proximately flowed from the negligent act. *Catamore* is also entitled to recover for expenditures reasonably made in a reasonable effort to avert the harm.

If you should find, from a preponderance of the evidence in the case, that *IBM* was guilty of negligence which caused, in whole or in part, any injury or damage to *Catamore*; and should further find, from a preponderance of the evidence in the case, that *Catamore* itself was guilty of some contributory negligence which contributed toward bringing about all or part of its own injury; then the total award of damages to *Catamore* with respect to negligence must be reduced by an amount equal to the percentage of fault or contributory negligence chargeable to *Catamore*. This is the rule of comparative negligence on which I have already instructed you.

The proper procedure to be followed by the jury in comparing the negligence of the parties, and returning a verdict in favor of *Catemore* for a reduced amount based upon that comparison, is: first, determine the full amount of all damages sustained by *Catamore*, as a proximate result of the transactions; next, compare the negligence or fault of the parties, by determining in what proportion, figured in percentage, *Catamore's* own fault contributed as a proximate [C-327] cause of all damages suffered by it as a proximate result of the transactions; then, reduce the full amount of *Catamore's* damages, by subtracting a sum equal to the percentage of the total you find, from a preponderance of the evidence in the case, was caused by *Catamore's* contributory negligence; and return a verdict in favor of *Catamore* for the amount remaining.

If this instruction seems complicated, let me illustrate with an example which, I hasten to add, is in no way to be interpreted as applicable to this case. In one case a jury found that the plaintiff had suffered damages of $20,000 and that the defendant's negligence was 60% responsible for the injury while plaintiff's contributory negligence was 40% responsible. It therefore returned a verdict for the plaintiff for $12,000.

I repeat that these figures are merely illustrative and in no way are they to be interpreted as having any application to this case.

[C-328] I must also instruct you that if you find that *IBM* is liable to *Catamore* under any one or more of the legal theories presented, in determining the amount of damage, if any, suffered by *Catamore*, you must also consider whether *Catamore* fulfilled its duty to mitigate or minimize its damages. This duty is sometimes called a "rule of avoidable harm."

It was the duty of *Catamore* to use reasonable care and to make reasonable efforts under the circumstances to prevent as much as reasonably possible the aggravation of any loss, injury or damage which it may have sustained as the result of *IBM's* unlawful conduct. *Catamore* is not entitled to recover for any loss, injury or damage which it knowingly permitted to increase or continue unless *Catamore* used reasonable

care and made reasonable efforts to reduce or prevent such loss, injury or damage.

The law asks only for reasonable prudence based on reasonable probability and honest human judgment. *Catamore* is not required to take any unreasonable risk or expense in mitigating damages.

In this regard, you should consider when *Catamore* was first in a position to minimize its damages.

If you find from the evidence that at that time *Catamore*, by reasonable care and reasonable efforts, could have reduced or prevented any loss, injury or damage sustained by it as the result of *IBM's* unlawful conduct, then *Catamore* cannot recover damages from *IBM* for any such loss, [C-329] injury or damage incurred thereafter which could have been so reduced or prevented.

On the other hand, if you find that *Catamore* made reasonable attempts to minimize its losses due to *IBM's* actions and incurred expenses in making such efforts, then *Catamore* can recover damages for these expenses, whether or not the attempt succeeded.

[C-330] If you should find that either *Catamore* or *IBM* is entitled to a verdict, in fixing the amount of your award of actual damages you may not include in, or add to an otherwise just award, any sum for the purpose of punishing the other party, or to serve as an example or warning for others. Nor may you include in your award any sum for court costs or attorney's fees.

There is one exception to this statement, however. In addition to actual damages, the law does permit the jury, under certain circumstances, to make a separate award to the injured party of punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If you the jury should find from a preponderance of the evidence in the case that *IBM* is liable to *Catamore* for fraud and/or negligence, and should further find that the act or omission of *IBM*, which proximately caused actual injury or damage to *Catamore*, was maliciously, or wantonly or oppressively done; then the jury may, if in the exercise of discretion they unanimously choose to do so, add to the award of actual damages such amount as you shall unanimously agree to be proper, as punitive and exemplary damages.

I must caution you, however, that you may not award punitive damages based on a finding, if you so conclude, [C-331] that *IBM* is liable to *Catamore* only for a breach of contract, contract warranty, and/or for mere negligence. The negligence involved, if any, must have been maliciously, wantonly or oppressively done before the jury may award punitive damages. For sake of convenience, I will refer to the type of negligence for which punitive damages can be awarded as "gross negligence," as distinguished from "mere negligence," as to which no award of punitive damages can be made.

In assessing punitive damages, you must look to the motive, purpose, and condition of the mind and heart of the wrongdoer, and the circumstances and manner of doing wrong. They are properly awarded where there is fraud, oppression, wilful or wanton, reckless or aggravated disregard for the rights and property of others.

An act or a failure to act is "maliciously" done, if prompted or accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is "wantonly" done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or a failure to act is "oppressively" done, if done in a way or manner which injures, or damages, or [C-332] otherwise violates the rights of another person with unnecessary harshness or severity, as by mis use or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

The amount to be awarded for punitive damages is totally within your discretion, but should bear some rational relation to the case at hand. This, however, means that you award these damages in proportion to the outrage and these damages may in your estimation be greater than the amount of actual damage awarded.

In assessing the amount of punitive damages, if any, you may take into account the ability of *IBM* to pay as a measure of what would be sufficient to discourage future misconduct, if you find such has occurred.

In summary, whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that *IBM's* act or omission which proximately caused actual damage to *Catamore* was maliciously or wantonly or oppressively done; but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first unanimously award *Catamore* a verdict for actual damages; and the jury should also bear in mind, not only the conditions under which, and the purposes [C-333] for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.

[C-334] Now, it is required in order for you to return a verdict that your decision be the unanimous decision of all six. You cannot return a verdict either for *IBM* or for *Catamore* unless and until you are in unanimous agreement as to what your verdict shall be.

Therefore, in the course of your deliberations and in your consideration of the evidence you should exercise reasonable and intelligent judgment. It is not required that you yield your conviction simply because a majority holds to the contrary view, but in pursuing your deliberations you should keep your minds reasonably open with respect to the point in dispute so that you will not be precluded or prevented from achieving unanimous verdict by mere stubborness or intellectual intransigence. After all, courts and juries would not be worth very much to the community unless occasionally we decide something. Nevertheless, it is your right to maintain your conviction. Each vote of each juror is as important as the vote of any other juror, and you need not give up a conviction sincerely held simply because a majority hold to the contrary view.

It goes without saying, of course, that prejudice, sympathy or compassion should not be permitted to influence you in the course of your deliberations. All that either party here is entitled to, or for that matter expects, is a verdict based upon your fair, csrupulous, and conscientious [C-335] examination of the evidence and an application thereto of the law as it has been given you by the Court. To yield either to sympathetic impulses or to considerations flowing from prejudice or bias would be to strike a blow at the very cornerstone of the system which you and I are sworn to uphold.

In the course of your deliberations, if you should deem it necessary to be further instructed or assisted by the Court in any way, I would ask that you reduce such requests or questions as you may have to writing through your foreman. The foreman may then hand such written request or question to the officer in whose charge you will now be placed. The officer will then bring such written question or request to me, and I will have you brought into the courtroom and will attempt to fulfill your request or answer the question as the case may be. Other than the method outlined, please do not attempt to communicate privately or in any other way with the Court.

Now, as a last word to you — I have told you the various verdicts you can bring in and there must be two separate verdicts, one as to *IBM's* claim against *Catamore* and one as to *Catamore's* claims as against *IBM*.

Mr. Foreman, madam and gentlemen of the Jury, I am about to place this case in your hands. This has been a long charge, and so I am going to give you six copies of it to take into the jury room with you, together with a form to be completed and signed by the foreman when you have reached [C-336] your decision. You will be required to report two separate verdicts and the form reflects this requirement by asking the following questions:

First, in the case of *IBM v. Catamore*, how do you find, for the plaintiff *IBM* or for the defendant *Catamore*?

If you find for the plaintiff, *IBM*, then, in accordance with my instructions, you must award damages in the amount of $68,453.23. So the next question on the form states that if you find for the plaintiff, *IBM*, you are directed to award damages in the amount of $68,453.23, and you must insert that amount.

Second, you will be asked: in the counterclaims of *Catamore v. IBM*, how do you find, for the counterclaimant *Catamore* or for the counterclaim defendant *IBM*?

If you find for the counterclaimant *Catamore*, in what amount do you award actual or compensatory damages?

Next, if you find for the counterclaimant *Catamore* under theory of fraud and/or gross negligence, you may, in accordance with my instructions, make a separate award of punitive damages to *Catamore* in addition to your award of actual or compensatory damages. So you will be asked, if you award punitive damages to *Catamore*, in what amount?

However, you are not to consider the issue of punitive damages unless you have found for *Catamore* on its counterclaims under either the theory of fraud or gross negligence or both. If you have so found, the fact that you [C-337] also find for *Catamore* for breach of contract will not prevent you from awarding punitive damages for *IBM's* fraud and/or gross negligence in accordance with my instructions. However, if the only theory of liability under which you hold *IBM* liable to *Catamore* is in breach of contract or contract warranty and/or mere negligence, you cannot make a separate award of punitive damages. It goes without saying, of course, that if you find that *IBM* is not liable to *Catamore* on *Catamore's* counterclaim under any theory of liability, you must not consider the question of any damages, actual or punitive, at all.

Members of the jury, this concludes my instructions and I now give the case to you.

APPENDIX L

IBM'S RULE 51 OBJECTIONS
(6/18/75, T-3808-T-3828)

[57 TR 69] (Whereupon jury left courtroom in custody of marshal at 12:10 P.M.)

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[T-3808] Well, gentlemen, start placing your exceptions on the record.

Mr. Edwards: One motion, Your Honor, with respect to the comment made in the course of argument yesterday by Mr. Christo. I realize that ordinarily what is conceived to be a misstatement of a fact is to be ignored by opposing counsel, but there is one specifically that I want to bring to the Court's attention, that was when Mr. Christo stated as a fact that the witness, Howie Matthews, said the package programs were a joke. The 29th day, at page 32, shows that the Court struck the language that it was considered a joke, that came up later, and I believe that the Court should instruct the jury that they are to disregard that, that it is not in the evidence.

The Court: I'm afraid that, I know what you say, I will put your exception on the record, but at this [57 TR 70] point it would be an overemphasis and would unduly focus the jury's attention to that portion complained of. I believe that it's more than amply covered in the charge itself when they were told that the facts are not as recited to them by the various attorneys, but rather, they recall it, however, your exception is on the record.

Mr. Edwards: All right, Your Honor. I have an exception or two with respect to Your Honor's charge made this morning prior to reading the prepared charge. First, with respect to Your Honor's statement that no inference may be drawn if a witness is equally available to both parties. The authorities, including one that I believe Your Honor is relying upon, in McCormack on Evidence, Sec-

tion 272 provides that, and I quote: "What is in fact meant is that when so far as appears, the witness would be as likely to be favorable to one party as the other, there will be no inference." And furthermore, it's stated there that it's often stated that when a potential witness is available and appears to have special information relative to the case, so that his testimony would be not merely cumulative, and where his relationship with one of the parties is such that the witness would ordinarily be expected to favor him, then if such party does not produce testimony, the inference arises that it would have been unfavorable."

[T-3809] [57 TR 71] We think that on the basis of the evidence that Mr. Correra did have a close family relationship with the defendant, the principals of the defendant, that he was a former officer of the defendants, and furthermore, that if the plaintiff were to have brought Mr. Correra in, the evidence would be cumulative, whereas if the defendants would bring him in, it would be contradictory evidence already in, so we think that the inference is very properly drawn under these circumstances by the plaintiff, although it would not have been by the defendant, and we therefore make that exception.

The Court: I would just add that I don't, of course, agree with you, I think that's a question of fact for the jury to decide, not for the Court, however, your exception is on the record.

Mr. Edwards: Now, with respect to the prepared charge, IBM excepts to those portions of the charge which relate to Fraud and Innocent Misrepresentation——

The Court: Since this is going to be filed, if you want to refer just to pages, you may, you can do it any way you wish. I was going to file one of these copies with the record.

Mr. Edwards: Yes, Your Honor, the first several exceptions are of a general nature and do not rely on specific pages, but from then on they do.

[57 TR 72] IBM excepts to those portions of the charge which relate to Fraud and Innocent Misrepresentation and the Remedies and Damages for the same in that there is a lack of evidence in the record in this case from which the jury could properly support a verdict on the basis of fraud or innocent misrepresentation, either at IBM's local branch office level or at a higher corporate level.

IBM excepts to any and all portions of the charge which relate to Fraud, Innocent Misrepresentation, and the Remedies for same, and Contract and the Remedies for Breach thereof, and any other portions of the charge which authorize the jury *first*, to grant Catamore the remedy of rescission in connection with the written Machine Service Agreement, the SES Agreement and any Estimates executed pursuant thereto, and *second* to award Catamore damages for fraud or breach of contract based on the alleged oral agreements which preceded those written contracts. IBM excepts to said portions of the charge on the grounds that Catamore's attempt to sue for damages on the alleged oral agreements violates the [T-3810] parol evidence rule and the substantive law of contracts relating to merger and novation, and further violates the rule that a party must seek reformation of the written contract before it can seek to benefit from any prior oral agreement which was merged into that written contract. IBM further excepts to said portions of the charge [57 TR 73] on the grounds that Catamore has failed to produce any evidence of mistake on its part which would permit this Court to grant reformation of the written contract. IBM further excepts to said charge on the grounds that Catamore in said charge is permitted to enjoy all the burdens which

were assented to in the written contract, thereby violating the rule that a party must either affirm or rescind the contract in its entirety.

Therefore, the charges to which IBM excepts includes, without limitation, the following specific portions of the charge:

(1) The second full paragraph on page 25 beginning with the words, "The second remedy" and ending with the words, "these contracts."

(2) The paragraph beginning at line 18 on page 35 with the words, "In addition," and ending at line 10 on page 36 with the words, "oral contract."

(3) The second full paragraph on page 36 beginning with the words, "In concluding" and ending with the words "the parties."

(4) The portion of the first full paragraph on page 42 beginning at line 9 with the words, "but only," and ending with the words, "SES Agreement."

[57 TR 74] (5) The second full paragraph on page 42 beginning with the words, "Even if you find," and ending with the words "in its entirety."

(6) That portion of the charge beginning on line 18 on page 56 with the words, "In this regard I remind you," and ending on line 8 on page 57 with the word, "therein."

(7) That portion of the charge which consists of the paragraph beginning on line 26 on page 57 with the words, "In this regard," and ending on line 9 on page 58 with the words, "contained therein."

[T-3811] IBM excepts to that portion of the charge relating to Agency which appears on line 19 of page 14 and includes the sentence, "Further, the law holds the corporation * * * does not tell the corporation these facts."

IBM excepts to that portion of the charge which relates to Fraud insofar as the Court failed to include at line 17 on page 17 after the words, "party has," the words "purposely and knowingly."

Also, on page 17, second line from the bottom, IBM excepts to the inclusion of the word "or believed."

IBM excepts to the Court's failure to include in that portion of the charge relating to Fraud, at the end of line 12 [57 TR 75] on page 18, the words, "and if you find the corporate officers knew or believed the agents would make the false representations to *Catamore* or to other *IBM* customers."

IBM excepts to that portion of the charge relating to Fraud, at line 13 on page 19, which includes the words, "parties in the same or similar position * * * rely upon the representation made." IBM excepts to the Court's failure to include in lieu thereof the words, "its agents would make false representations to its customers when such corporate officers knew or believed at the time that such representations were in fact false."

IBM excepts to that portion of the charge which relates to Fraud and consists of that portion of the second full paragraph on page 20 at line 19 beginning with the words, "In such a case," and ending with the words, "found it unimportant."

IBM excepts to the Court's failure to include in that portion of the charge relating to Fraud, at the end of the second full paragraph on page 21, the sentence, "If you find that, subsequent to the time when the alleged representation was made, *Catamore* became aware or should have become aware that the representations were false, then *Catamore* is not entitled to recover damages for any loss or injury related to those representations which it could have reasonably avoided after having become aware that the representations were false."

[57 TR 76] IBM excepts to that portion of the charge relating to Fraud which consists of the third full paragraph on page 21, beginning with the words, "On the other hand," and ending with the words, "falsity of the representation."

[T-3812] IBM excepts to that portion of the charge relating to Fraud, at line 3 on page 23, which includes the words, "or believed," and, at line 4 on page 23, which includes the words, "even though the agent making the representations * * * knew they were false." IBM excepts to the Court's failure to include in lieu of said latter words, the words, "that *IBM's* corporate officers knew the representations were false and knew or believed that its agents would make such representations or encouraged them to do so."

IBM excepts to that portion of the charge relating to Fraud Remedies and Innocent Misrepresentation, at line 25 on page 24 and at lines 1-2 on page 25, which consists of the sentence, "It does not matter * * * to make it."

IBM excepts to that portion of the charge relating to Fraud Remedies and Innocent Misrepresentation which consists of the second full paragraph on page 25, beginning with the words, "The second remedy," and ending with the words, "one or both of these contracts" IBM excepts to the Court's failure to include in lieu of said latter words the following paragraph:

> [57 TR 77] "The second remedy is damages. Thus, if you find for *Catamore* on an issue of fraud, you may consider the issue of damages. Should you find that the Machine Service Agreement and the SES Agreement were procured as a result of fraudulent misrepresentation, you are instructed that *Catamore* had available to it one of two remedies; namly, (i) to affirm or to ratify all the terms of those agreements and then seek damages or (ii) to rescind the agreements and be restored to its former position. You are instructed that *Catamore* has elected to affirm the agreements and seek damages. In so doing, *Catamore* may not affirm a portion of those agreements and disaffirm others. The law requires that *Catamore* must affirm all of the provisions of those agreements and is thus subject to the benefits as well as the burdens of those agreements. Therefore, you are further instructed that the provisions of the Machine Service Agreement and the SES Agreement which disclaim liability for any warranties except as specifically set forth and which limit any warranties except as specifically set forth and which limit *IBM's* liability for damages are valid and *Catamore* is bound by them. These contractual provisions must be considered in determining *Catamore's* damages, if any, should you find fraud."

[T-3813] IBM excepts to that portion of the charge relating to Fraud Remedies and Innocent Misrepresentation which consists [57 TR 78] of the first full paragraph on page 26, beginning with the words, "Thus, if you find," and ending with the words "verdict must be for *Catamore.*" IBM excepts to the Court's failure to include in lieu of said paragraph, the following paragraph:

> "Thus, if you find no fraud as to the alleged 1968 oral agreement or the Machine Service Agreement, you must also find there was no fraud as to the other. For example, if you find no fraud as to the Machine Service Agreement, you must find for *IBM* on its claim for moneys due. If you find fraud, *Catamore* is then relieved of liability and your verdict must be for *Catamore.*"

IBM excepts to that portion of the charge relating to Fraud Remedies and Innocent Misrepresentation which consists of the third full paragraph on page 26 beginning with the words, "On the other hand," and ending with the words, "as well as in negligence."

IBM excepts to that portion of the charge relating to Contract which consists of the first full paragraph on page 28 beginning with the words, "*Catamore*, on the other hand" and ending with the words, "production control system." IBM further excepts to that portion of such charge which consists of the first sentence of the third full paragraph on page 28 at lines 20-26, beginning with the words, "*Catamore* claims," and ending with the words, "operation of the business." IBM [57 TR 79] excepts to the Court's failure to include in lieu of the foregoing sentences the following paragraph:

> "*Catamore*, on the other hand, takes a dual position. It contends alternatively (a) that the Machine Service Agreement was only a portion of the agreement made by the parties in September, 1968, and that another portion of such agreement was oral or (b) that at the same time that the Machine Service Agreement was entered into the parties also entered into a separate oral contract. According to *Catamore*, under the Machine Service Agreement IBM promised to furnish *Catamore* and maintain for it a computer and certain other equipment ("hardware") and that by the oral portion of the September, 1968, agreement or by the separate oral agree[T-3814]ment then entered into, IBM promised to furnish to *Catamore* certain support services, which, together with the hardware, would constitute what *Catamore* calls a 'totally integrated computerized system' or 'turnkey system' for its use in connection with the operation of its business."

IBM excepts to that portion of the charge which relates to Contract and which consists of that portion of the first full paragraph on page 30 beginning at line 7 with the words, "For example" and ending with the words, "would not have."

Also, now, excuse me, on page 31 IBM excepts to the additional sentence that has been added, which reads as [57 TR 80] follows: "However, if you find that IBM did not normally reduce software contracts to writing, this rule does not apply."

IBM excepts to that portion of the charge relating to Contract which consists of the first full paragraph on page 33, beginning with the words, "Now *IBM* takes a dual position," and ending with the words, "relating to services." IBM excepts to the Court's failure to include in lieu of said paragraph the following two paragraphs:

> "*IBM* takes the position that in September, 1968, it made to *Catamore* no binding promises other than those contained in the Machine Services Agreement; but if you should find that it did make binding oral promises to *Catamore* at that time, it will become necessary for you to find whether such oral promises were contained in the oral portion of a partly oral, partly written, contract entered into between the parties in September, 1968, or whether, on the other hand, such promises were contained in an oral contract separate from the Machine Service Agreement.
>
> "If the former is true (i.e., there was one agreement, partly oral and partly written), then I charge you that the provisions of the Machine Service Agreement limiting warranties will apply to the promises contained in the oral portion of the September, 1968,

agreement. If the latter is true (i.e., if there were two separate contracts entered into by the parties in September, 1968, one oral and one written), then you will [57 TR 81] have to determine whether there was consideration for whatever promises *IBM* made in the [T-3815] oral contract and if so, whether such promises were subsequently superseded by the SES Agreement."

IBM excepts to that portion of the charge which relates to Contract and which consists of the first full paragraph on page 34 beginning with the words, "It is IBM's position," and ending with the words "no novation."

IBM excepts to that portion of the charge which begins six lines from the bottom of page 35, with the words, "In addition to," and continues to the end of that paragraph on page 36, including the words "earlier oral contract." IBM more specifically excepts to the statement twice made in that paragraph, IBM expressly and specifically excepts to that portion of the charge in that same paragraph where the word "system" appears without the word "design," following the word "system."

IBM excepts to that portion of the charge which is set forth in the last full paragraph on page 36, beginning with the words, "In concluding this aspect," and continuing through to the words, "between the parties."

IBM excepts to that portion of the charge relating to Warranties insofar as the Court failed to include in the third full paragraph on page 41 the following clause immediately after the words "SES Agreement" on line 19:

> "and if you find there was an oral agreement between *Catamore* [57 TR 82] and *IBM* in September 1968 and such agreement was superseded by the SES Agreement in December 1969, then any action under either agreement is subject to the one year limitation."

IBM excepts to that portion of the charge relating to Warranties which consist of the portion of the first full paragraph on page 42 beginning on line 9 with the words, "But only as to claims," and ending on line 19 with the words, "SES Agreement." IBM further excepts to that portion of said charge which consists of the second full paragraph on page 42 beginning with the words, "Even if you find," and ending with the words, "in its entirety."

IBM excepts to that portion of the charge relating to Negligence insofar as the Court failed to include in the first full paragraph on page 44 at line 1 the words "apparent" before the [T-3816] word "danger." IBM further excepts to the portion of said paragraph at line 2 which consists of the words, "was to." IBM excepts to the Court's failure to include in lieu of the latter two words the words, "owed by." IBM further excepts to the Court's failure to include at the end of said paragraph at line 3 the following clause:

> "provided *Catamore*, which was also an experienced business enterprise, also exercised a reasonable degree of care."

IBM excepts to that portion of the charge relating to Damages Generally insofar as the Court failed to include after [57 TR 83] the first full paragraph on page 49 the following two paragraphs:

> "To be more specific, I have already instructed you concerning the possible grounds for liability in this case and the elements as to each ground which must be proved by *Catamore*. These grounds, as claimed by *Catamore*, include (1) fraud, (2) breach of contract

and contract warranties, and (3) negligence. All three grounds relate to a considerable extent to the same subject matter, that is, the alleged statements made in behalf of *IBM* to *Catamore* in September 1968 that *IBM* would furnish *Catamore* with a totally integrated computerized system. In essence, *Catamore* is seeking extensive damages from *IBM*, based upon one or more of these grounds, because, as *Catamore* claims, such a computerized system was not furnished in conformity with *IBM's* alleged statements and because, as a result, *Catamore* has allegedly suffered the damages sought. Therefore, if *Catamore* has established liability on one or more of these grounds, then, subject to the instructions which I shall give you as to the items of damage which you may consider under each ground, *Catamore* will be entitled to an award or damages, but, in determining the amount of that award, you may not consider the same item of damage more than once, regardless of the number of separate grounds which may entitle *Catamore* to be awarded that item of damage.

"Further, I instruct you that, since *Catamore* is claiming [57 TR 84] to have been damaged by *IBM's* fraud, breach of contract, breach of warranty or negligence, *Catamore* has the burden of showing that the damages it claims were actu[T-3817]ally caused by the fraud, negligence or breach of contract or warranty by *IBM*. That is, it is not enough merely to show that there was fraud, or negligence or breach of contract or warranty and that there were damages; the one must be shown to be connected to the other."

IBM excepts to that portion of the charge relating to Damages for Fraud which consists of the full paragraph beginning on line 2 of page 50 with the words, "Let me remind you," and ending with the words, "breaches of these contracts." IBM excepts to the Court's failure to include in lieu of said paragraph the following paragraph:

> "Let me remind you, as I stated earlier when discussing my instructions on fraud, a party, upon proving fraud, is entitled to one of two remedies. First, that party may rescind and be restored to its original position prior to contract. Second, that party may affirm the contract and sue for damages. *Catamore* has elected the second remedy, namely, to affirm the contracts and sue for damages, by affirming *Catamore* is bound by the limitations set forth in those contracts. Subject to such limitations, upon proving fraud, a party is entitled to damages which proximately flow from the fraudulent conduct."

IBM excepts to that portion of the charge relating to Damages for Fraud insofar as the Court failed to include at [57 TR 85] the end of the first sentence in the first full paragraph on page 51 after the words, "from the fraud," the words, "prior to its discovery or which could not be reasonably avoided after discovery of the fraud." IBM further excepts to the Court's failure to include at the end of said paragraph at line 17 after the words, "result of fraud," the words, "and if you also find that such expenses could not be avoided by reasonable efforts on the part of Catamore."

IBM excepts to the Court's failure to include in that portion of the charge relating to Damages for Breach of Contract or Contract Warranty at the end of the second full paragraph on page 53 after the words "the contract" on line 12, the words,

"subject to the disclaimers and limitations as to damages contained in either of the written contracts, namely, the Machine [T-3818] Service Agreement and the SES Agreement, which I have called to your attention, if the breach related to any matter which is within the scope of either of those written contracts."

IBM excepts to that portion of the charge which relates to Damages for Breach of Contract and Contract Warranties which consist of the first full paragraph on page 54 beginning with the words, "Keeping these limitations," and ending with the words, "net profits." IBM further excepts to the Court's failure to include in lieu of said paragraph the following paragraph:

[57 TR 86] "Keeping these limitations and disclaimers in mind, I charge you that you may consider as items of damage any expenses actually incurred by *Catamore* in preparation for performance by *IBM* of its contractual obligations, which expenses would not have been incurred by *Catamore* but for *IBM's* alleged breach of contract or contract warranty, including such items as commissions, salaries and administrative expenses connected with the contract. You may consider as well actual losses of net profits resulting directly from any such breach which should have been foreseen by the parties when the contract was made."

IBM excepts to that portion of the charge relating to Damages for Breach of Contract and Contract Warranty insofar as the Court failed to include in the first full paragraph of page 56 at line 2 after the words, "that are not," the words, "specifically disclaimed by that agreement or * * *."

IBM excepts to that portion of the charge relating to Damage for Breach of Contract and Contract Warranties which consists of that portion of the third full paragraph on page 56 beginning at line 18 with the words, "In this regard," and ending on line 8 of page 57 with the word, "therein."

IBM excepts to that portion of the charge relating to Damages for Breach of Contract and Contract Warranties which consists of that portion of the first full paragraph on page 57 [57 TR 87] beginning at line 15 with the words, "shall not exceed," and ending at line 16 with the words, "Machine Service Agreement." IBM excepts to the Court's failure to include in lieu of the latter words, the words, "are limited by the provisions of the Machine Service Agreement under which *IBM's* obligation is [T-3819] limited to the repair or replacement of any parts of machines in lieu of all other obligations or liabilities on the part of *IBM* for damages."

IBM excepts to that portion of the charge relating to Mitigation of Damages insofar as the Court failed to include in the second full paragraph on page 61 at line 10 after the word, "prevent," the words, "or minimize." *IBM* further excepts to that portion of said charge at lines 12 and 26 on page 61 consisting of the words, "*IBM's* unlawful conduct." IBM excepts to the Court's failure to include in lieu of the latter words the words, "conduct on the part of *IBM* which you may find to be improper."

IBM excepts to that portion of the charge relating to Punitive Damages which consists of the words, "and/or negligence" on page 63 at line 17. IBM further excepts to that portion of said charge which consists of the "or oppressively" on page 63 at lines 18-19 and on page 65 at line 21. IBM further excepts to that portion of said charge which consists of the first two full sentences on

page 64 beginning with the words, "The [57 TR 88] negligence involved," and ending with the words "can be made." IBM further excepts to that portion of said charge which consists of the words "oppression, wilful or wanton, reckless or aggravated" on page 64 at lines 12-13. IBM excepts to the Court's failure to include in lieu of the latter words the words "accompanied by malice, wilfulness, wantonness or a conscious and deliberate ***." IBM excepts to that portion of said charge which consists of the word beginning, "in reckless," and ending with the words, "injured person," on page 64 at lines 21-23. IBM excepts to the Court's failure to include in lieu of the latter words the words, "consciously with knowledge of existing conditions and with a consciousness that injury would likely result to another from the act or omission." IBM excepts to that portion of said charge which consists of the paragraph beginning with the words, "An act or a failure to act is 'oppressively' done" on page 64 at line 24, and ending with the words, "misfortune of another person" on page 65 at line 4.

IBM excepts to that portion of the charge relating to Closing Instructions which consists of the words, "and/or gross negligence" on page 69 at lines 18 and 25-26 and on page 70 at lines 2-3. IBM excepts to any and all other charges which consists of [T-3820] instructions that punitive damages may be assessed by the jury in cases of mere negligence, gross negligence or oppression.

[57 TR 89] IBM excepts to those portions of the charge which relate to Punitive Damages in that there is a lack of evidence in the record in this case upon which the jury could properly assess and award punitive damages to Catamore, either on the grounds of malice, wantonness or wilfulness in the commission of a tort.

IBM excepts to that portion of the Verdict Sheet which offers the jury the option to award punitive damages, specifically Question 2(c) thereof.

IBM excepts to that portion of the charge which relates to Damages for Negligence, at lines 20 and 21, on page 59, which includes the words, "and returning a verdict in favor of Catamore."

The plaintiffs also except to the Court's denial, there has been a denial of the plaintiffs' motion for special interrogatories or verdicts under Rule 49.

That completes our exceptions, Your Honor.

APPENDIX M

IBM'S MOTION FOR A DIRECTED VERDICT

(5/23/75, P-251-P-257)

P-251

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 5030

INTERNATIONAL BUSINESS MACHINES CORPORATION

v.

CATAMORE ENTERPRISES, INC.

MOTION FOR DIRECTED VERDICT

Now comes the plaintiff and pursuant to the provisions of Rule 50(a) of the Federal Rules of Civil Procedure moves the Court to direct a verdict in its favor defendant's counterclaims as most recently amended on the grounds specified as follows:

A. *Re: specific counts*

Counts I and VIII in their entirety and such portions of Counts II, III, and IV as allege fraud or fraudulent representations

1. There is insufficient evidence to warrant a finding that the plaintiff made any fraudulent representation to the defendant.

2. There is insufficient evidence to warrant a finding of fraud on the part of the plaintiff.

3. There is insufficient evidence to warrant a finding that the plaintiff made any representation to the defendant which was

(a) false;

(b) made by the plaintiff knowing it to be false;

(c) of a material fact;

(d) not merely an opinion, prediction, estimate, or judgment, as distinguished from a statement of fact susceptible of actual knowledge;

(e) made with the intent to deceive the defendant;

(f) made with the intent that such representation be acted upon by the defendant; or

(g) in fact acted upon by the defendant to its damage, in ignorance of the falsity of the representation; *all* of which, as a matter of applicable law, are requisite to a finding of liability for fraud or fraudulent misrepresentation.

Count II

In addition to there being insufficient evidence to warrant a finding of fraud or fraudulent misrepresentation on the part of the plaintiff as stated above,

1. To the extent that by the allegations of Count II the defendant is seeking damages for the alleged breach of an agreement or agreements entered into between the parties in September, 1968, the evidence requires as a matter of law a finding that the defendant is not entitled to recover any damages from the plaintiff, by reason of the disclaimer provisions of the Machine Services Agreement between the parties entered into in September, 1968 (plaintiff's Trial Exhibit 1).

2. To the extent that by the allegations of the Count II the defendant is seeking damages for the alleged breach of "additional agreements . . . for technical support for the implementation of the computer system" entered into between the parties subsequent to September, 1968, the evidence requires as a matter of law a finding that the defendant is not entitled to recover any damages from the plaintiff, by reason of the fact that the defendant did not bring its action against (P-253) the plaintiff within one year after its alleged cause of action accrued, as provided in the Systems Engineering Agreement between the parties entered into in December, 1969 (plaintiff's Trial Exhibit 2), the provisions of which are applicable to the various agreements between the parties supplemental thereto (plaintiff's Trial Exhibits 3 through 11).

Count III

In addition to there being insufficient evidence to warrant a finding of fraud or fraudulent misrepresentation as stated above,

1. To the extent that by the allegations of Count III the defendant is seeking damages for the alleged breach of said Systems Engineering Agreement (plaintiff's Trial Exhibit 2) and, by implication, the various agreements between the parties supplemental thereto (plaintiff's Trial Exhibit 3 through 11), the evidence requires as a matter of law a finding that the defendant is not entitled to recover any damages from the plaintiff, by reason of the fact that the defendant did not bring its action against the plaintiff within one year after its alleged cause of action accrued, as provided in said Systems Engineering Agreement.

Count IV

In addition to there being insufficient evidence to warrant a finding of fraud or fraudulent misrepresentation on the part of the plaintiff as stated above,

1. To the extent that by the allegations of Count IV the defendant is seeking to recover damages from the plaintiff for alleged breach or breaches of warranty the evidence requires as a matter of law a finding that the defendant is not entitled to recover any damages from the (P-254) plaintiff by reason of the disclaimer-of-warranty provisions of

both said Machine Services Agreement and said Systems Engineering Agreement.

2. To the extent that by the allegations of Count IV the defendant is seeking damages for the alleged breach or breaches of said Systems Engineering Agreement between the parties and the various agreements between the parties supplemental thereto (plaintiff's Trial Exhibits 3 through 11), the evidence requires as a matter of law a finding that the defendant is not entitled to recover any damages from the plaintiff, by reason of the fact that the defendant did not bring its action against the plaintiff within one year after its alleged cause of action accrued, as provided in said Systems Engineering Agreement.

Count V

1. There is insufficient evidence to warrant a finding that plaintiff was responsible for the hiring by the defendant of the individuals referred to in Count V.

2. There is insufficient evidence to warrant a finding that the defendant "incurred expenses of training" said individuals, as alleged in Count V.

3. There is insufficient evidence to warrant a finding that any of the services rendered to the defendant by said individuals was of no benefit to the defendant.

4. There is insufficient evidence to warrant a finding that the defendant which, as the evidence clearly (P-255) establishes, has continuously since 1970 made use of data processing in its business operations, would not have required the services of said individuals, even if the plaintiff was in one or more respects at fault with respect to its obligations to the defendant.

5. Even if it be assumed that the evidence is sufficient to warrant a finding that the defendant did not derive full value from the services performed for it by the individuals referred to in Count V, the evidence is insufficient to warrant a finding as to the difference between the value to the defendant of such services and the amounts paid by the defendant for such services, and, therefore, the evidence is insufficient to warrant a finding of damages against the plaintiff.

Count VI

1. The evidence is insufficient to warrant a finding that the adoption of a new inventory numbering system by the defendant was caused by the plaintiff or, even if it had been, that such new inventory numbering system was the cause of any damage to the defendant.

2. The evidence is insufficient to warrant a finding that the adoption of such new inventory numbering system was ill advised.

3. The evidence is insufficient to warrant a finding that the defendant suffered any damage as a result of the adoption of such new inventory numbering system.

4. The evidence is insufficient to warrant a finding of any liability on plaintiff's part with respect to such new inventory numbering system.

(P-256)

Count VII

The evidence is insufficient to warrant a finding of liability on the part of the plaintiff to the defendant with respect to the matters referred to in Count VII.

B. *Re: loss of profits*

1. The evidence requires as a matter of law a finding that the defendant is not entitled to recover any damages from the plaintiff for alleged loss of profits as claimed in Counts

I, IV, and VIII for the reason that loss of profits are not recoverable in an action of fraud.

2. The evidence requires as a matter of law a finding that the defendant is not entitled to recover any damages from the plaintiff for alleged loss of profits for the reason that, under the provisions of said Systems Engineering Agreement, which agreement governs all supplemental agreements between the parties and, by novation, all agreements previously entered into between the parties the plaintiff was not to be "liable for any lost profits."

3. There is insufficient evidence to warrant a finding that the defendant lost profits as a consequence of any fault on the part of the plaintiff.

4. Even if there were sufficient evidence to warrant a finding that the defendant lost profits as a consequence of fault on the part of the plaintiff, there is insufficient evidence to warrant a finding of the amount of such damages.

C. *Re: asserted ineffectiveness of disclaimer provisions of agreements between the parties because of alleged misrepresentations*

There is insufficient evidence to support a finding that defendant was induced to enter into either said Machine Service (P-257) Agreement or said Systems Engineering Agreement by misrepresentations, whether intentional or unintentional, on the part of the plaintiff, and, accordingly, the evidence requires as a matter of law a finding that said Systems Engineering Agreement was not subject to rescission at the instance of the defendant and, further, that the defendant never did rescind or even attempt to rescind said Agreement, as a consequence of which the various disclaimer provisions of said Agreements are not ineffectual, as contended by the defendant.

The plaintiff reserves the right to move for a directed verdict with respect to Count IX.

By its attorneys,

2700 Hospital Trust Tower
Providence, Rhode Island 02903

May 23, 1975

CERTIFICATION

I certify that on this day of May, 1975, I delivered personally to Thomas K. Christo, Esq., one of the attorneys for the defendant, a copy of the foregoing motion.

(James K. Edwards)

APPENDIX N

IBM'S MOTION FOR A DIRECTED VERDICT ORAL ARGUMENT

(5/27/75, T-2693-T-2699)

Appendix N.

[41 TR 1] TUESDAY, MAY 27, 1975

[T-2693] The Court: * * *

All right. We were going to take up this morning the motion for directed verdict, and then we were going to take up the charge that I gave you for your examination and comments. Shall we start the motion for directed verdict? * * *

Mr. Edwards: Incidentally, I would hope also this morning Your Honor might feel in a position to rule on the motion for a more definite statement. I forgot to raise that again for the Court on Friday. I don't know whether counsel for the defendant has submitted any authorities as they've been invited to do, but we would like to know what negligence it is that they're referring to.

With respect to the motion for a directed [41 TR 2] verdict, Your Honor, with respect to a number of the counts I think the motion pretty well speaks for itself, and I would prefer, unless Your Honor directs otherwise, to concentrate on the fraud issue [T-2694] which entirely involves Counts 1 and 8 and in part Counts 2, 3 and 4, and also I'd like to talk about Count 4 in the limitations in the—that are provided in the Systems Engineering Agreement. With respect to fraud, this ties in also with Your Honor's proposed charges. It is our position that it isn't enough to go to the jury on fraud. Their allegations here of high-level fraud, as to low-level fraud, I would call the Court's attention to remarks made by Mr. Christo to Judge Hagopian back in September as follows: "May it please the Court, I believe counsel is confused. I'm not alleging that Mr. Davitt or any other specific employee of the plaintiff defrauded the defendant, I'm alleging that the

IBM Corporation defrauded the defendant, and that this was by design and that this was intentionally done. Therefore the state of knowledge of the Data Process Department, which marketed or caused to be marketed the system to the defendant is direct relevance here." Whether statements by counsel constitute evidence in Rhode Island the law is clear in *Socony Vacuum Oil Company* v. *French*, 88 R. I. 6, 1958, the Court held that when counsel at the very beginning of the trial stated, and here's a quote from what the counsel stated: "Now, in this connection, Your Honor, these figures, [41 TR 3] both the Town and our figures are based upon an assessment of 80 percent of the value, I think that in valuing the property in East Providence, it is valued at 80 percent of its full and fair cash value, as is done in many places," the Court held that such statements amount to judicial admission which takes the place of evidence. We think as far as low-level fraud is concerned there's been a judicial admission on the part of the defendant, and furthermore, even if that admission hadn't been made, there is insufficient evidence to justify giving it to the jury. With respect to high-level fraud, the only witness who has been called was Mr. Hume, and Mr. Hume for two and one-half days on the stand emphatically denied any fact which would suggest it was a high-level corporate policy on the part of IBM to deceive its customers. Now, Mr. Christo might argue, "Well, the jury may not believe Mr. Hume," but even if that were true, it still leaves the defendant with no affirmative evidence to establish that there was a high-level IBM policy, so we earnestly urge the Court to take this issue of fraud away from the jury, not give it to them. It's a highly inflammatory accusation which, if the jury is permitted to think that that's involved in this [T-2695] case, may unfairly affect the jury's deliberations on other issues. There's some law that I do not believe we have cited to Your Honor before on the issue of fraud, which I would like to cite now. "It's [41 TR 4] been held that 'Creating a mere suspicion does not meet this burden of proof, for if the facts shown are consistent, as well with honesty as with fraud, the transaction should be held honest.'" That's the case of *Swager* v. *Vogt*, which is 435 S. W. 2d 49, a Kansas City appeals case of 1968.

The Court: What page, please, Mr. Edwards?

Mr. Edwards: I don't have a specific page reference for that, Your Honor, just page 49 is where the case starts, 435 S.W. 2d 49.

The Court: Now, I'm not sure that we have S. W. 2d reports in our library.

Mr. Edwards: I'd be glad to get a Xerox of it.

The Court: Would you by any chance get an excerpt of it?

Mr. Edwards: I'd be glad to, Your Honor.

• • •

Mr. Edwards: Here's another case where this is the case of *Malloy* v. *Bemis Brothers Bag Company*, 174 F. Supp. 785 at page 793, D. N. H.

The Court: 174 F. Supp.——

Mr. Edwards: 785 at page 793, that's the District of New Hampshire, decided 1959 and it was modified [41 TR 5] on other grounds by the First Circuit in 283 F. 2d 32, and quoting from that case: "To be sure, like any other fact, it (referring to fraud) may be proven by circumstantial evidence, but a mere surmise or suspicion is not enough." The case of *Terrill* v. *Carpenter*, 143 F. Supp. 747 at pages 753, 54, decided in the Eastern District of Kentucky, 1956, a case which was affirmed at 249 F. 2d 142, the Court said: "Fraud may be proved by positive evidence or circumstances and inferences fairly and rea-

sonably deductible therefrom, but it may not be proved by mere inferences, conjecture or suspicion and where the proven facts or circumstances merely show inferences, conjecture or suspicion or such as to leave reasonably prudent minds in doubt, it must be regarded as a failure of proof to establish fraud."

The Court: Would you please read that first part of that citation to me again.

Mr. Edwards: Yes, Your Honor.

The Court: "Must be proven by——

[T-2696] Mr. Edwards: "Must be—" "It may not be proved by mere inferences, conjecture or suspicion, and where the proven facts or circumstances merely show inferences, conjecture or suspicion, or such as to leave reasonably prudent minds in doubt, it must be regarded as a failure of proof to establish fraud." Now, cases which hold that proof of nonperformance of [41 TR 6] an alleged oral promise is in itself not evidence of fraud include the case of *Hubert* v. *May*, 292 Fed. 2d 239 at page 243, it's a Seventh Circuit case where the Court said: "Nonperformance, however, in itself, is not evidence of fraud," and in that case the Court of Appeals affirmed the direction of a verdict for the defendant on the issue of fraud, and the Court of Appeals reiterated the test of a direction, quoting from The United States Supreme Court case of *Gunning* v. *Cooley*, 281 United States 90 at page 94, decided 1930 as follows: "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions established a more reasonable rule that in every case before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there's any upon which a jury may properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed." Taking those authorities and applying them to the defendant's case on fraud, Your Honor, we submit most earnestly that there is not enough to go to the jury.

Turning now to the fourth amended counterclaim in our motion for direction starts on page 3 on Count 4. Here the plaintiff states that in addition to there being insufficient evidence to warrant a finding of fraud or fraudulent misrepresentation on the part of plaintiff as stated above, [41 TR 7] one, to the extent that by the allegations of Count 4 the defendant is seeking to recover damages from the plaintiff for alleged breach or breaches of warranty, the evidence requires as a matter of law a finding that the defendant is not entitled to recover any damages from the plaintiff by reason of the disclaimer of warranty provisions of both the Machines Services Agreement and the Systems Engineering Agreement. Now, I recognize that the defendant is now asserting that the SES Agreement, and presumably he's referring also to the estimates which were entered into pursuant to that agreement, were induced by fraud, and therefore any limitation provisions, any disclaimer provi[T-2697] in the SES Agreement will not be applicable, but Your Honor, if you will turn to the fourth amended counterclaim, you will see that the defendant is not asking for a rescission of that Service Engineering Agreement, it is seeking to get damages for the breach of that agreement, and he cannot have it both ways, he must elect his remedy even under the law that he's cited. He must either rescind or he must accept the contract and sue for the breach. The defendant has sued for the breach, and even if there were, and we submit that there's absolutely no evidence to support the contention, but even if there were action on the part of the plaintiff which induced the defendant to enter into the SES Agreement, either induced by innocent misrepresentation

or induced by fraud, nevertheless [41 TR 8] that has no applicability here, because there's been no election to rescind by the defendant, it is suing for damages.

The Court: Is it your position that you cannot send this case to the jury, having them to decide whether it is fraud and if they don't find fraud to have them consider a breach?

Mr. Edwards: It is certainly our contention, Your Honor, that the jury should not be permitted to consider the issue of fraud, and when I'm speaking of fraud now, I'm speaking now of the claim for affirmative damages.

The Court: I understand your position, because if I should agree with you as far as fraud is concerned, it would drastically change the entire picture.

Mr. Edwards: Yes, it would, Your Honor.

The Court: But if I don't agree with you, is it your position that the law prohibits the Court from sending the case on both fraud and breach of contract?

Mr. Edwards: Well, that's a good question, Your Honor. We've wrestled with that, and it is our position that before it goes to the jury and the election of remedies must be made, and as a matter of fact some law is being looked up at this very day.

The Court: What other points do you wish, Mr. Edwards?

[41 TR 9] Mr. Edwards: I'd like to take up the second portion of our motion with respect to Count 4. Our motion reads in this regard as follows: To the extent that by the allegations of Count 4 the defendant is seeking damages for the alleged breach or breaches of said Systems Engineering Agreement between the parties and the various agreements between [T-2698] the parties supplemental thereto, referring to plaintiff's trial Exhibits 3 through 11, the evidence requires as a matter of law finding that the defendant is not entitled to recover any damages from the plaintiff by reason of the fact that the defendant did not bring its action against the plaintiff within one year after its alleged cause of action accrued as provided in said Systems Engineering Agreement. Now, I would refer Your Honor to the pages of the transcript of the proceedings here. Miss Mignanelli's testimony in Volume 14, pages 110 through 115, and in the same volume her testimony, pages 116 to 121, where she testified that deficiencies regarding the merchandise control report were noted in June of 1970. In the same volume also Miss Mignanelli's testimony, pages 136 to 139, Catamore knew by the year end 1970 that the merchandise control reports were inaccurate. Robert Catanzaro in Volume 10, pages 52 to 56A, he testified that the MV Vicario programming deficiencies were found during 1971. He said they were brought to his attention by his employees, and he talked to IBM about it, and [41 TR 10] then he said he found out about it personally in December, 1971. Also Mr. Catanzaro, Volume 10, Pages 57 to 58 testified that he discovered MV Vicario was overinventoried in December, 1970. Furtner, also in Volume 10, Pages 52 to 53 Mr. Catanzaro referred to a letter that he sent to IBM on December 28, 1971, remembering always Your Honor that the Counterclaims were not brought until January of '73, a letter relating to a possible rebate of $25,000, and when he was asked what he was referring to there, he said he was referring to MV Vicario situation. Now it is true that Mr. Catanzaro later testified contrary to what he had earlier testified in a very singular way. In Volume 21 at Pages 160-162, and I should say perhaps particularly on Page 161 to 162, here was the question put to Mr. Catanzaro, "Now can you tell us more particularly how the faulty computer system as you said led to the demise of MV Vicario? Answer—Well

this was, first I should say, I think I should say, I only discovered this in 1972. If ever there [41 TR 11] was a man who agreed, looked over the contract between the first time he testified and the second time he testified, this was that time. And on the next page, page 162 he said, "all during this time, I didn't realize this, nobody ever had at MV Vicario realized this and in 1972 I only discovered this when I took inventory myself." We certainly intend to tell the jury about this when we get to final [T-2699] argument. So there is unquestionably testimony by both Mignanelli and Robert Catanzaro that MV Vicario defiiciencies were discovered——

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Mr. Edwards: (Cont'd) that there were deficiencies in the, under the MV Vicario service estimates discovered back in '70 and '71, and anything that was discovered before January 3, 1972, cannot be the basis for a cause of action under the SES Agreement and as I've tried to point out earlier, there's no basis for rescinding the SES Agreement and the Disclaimer [41 TR 12] and limitation provisions in it because there's been no attempt to rescind that agreement on the part of the defendant who wants the benefits of that Agreement but where it thinks it doesn't like the limitations in it, it says we don't want to be bound by that. Now I could go through the rest of my Motion Your Honor but I think it's self explanatory. Those were the main points I wanted to make.

APPENDIX O

IBM'S MOTION FOR A DIRECTED VERDICT ORAL RENEWAL

(6/16/75, T-3648)

Mr. Edwards: And the Plaintiff renews the Motion for Directed Verdict on the several issues that were covered in its Motion for Directed Verdict and subject to the ruling on that Motion, we rest at this time. I have to rest in front of the jury. Okay. [T-3648]